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Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1389

UNITED STATES OF AMERICA

vs.

CADILLAC OVERALL SUPPLY COMPANY, *Petitioner*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, CADILLAC OVERALL SUPPLY COMPANY, by its attorney, PATRICK B. MCCAULEY, respectfully prays that a Writ of Certiorari issue to review that Judgment heretofore entered against it by the United States Court of Appeals for the Fifth Circuit on February 28, 1978.

OPINIONS BELOW

The Judgment and Commitment of the United States District Court for the Southern District of Florida, is unreported, but is set forth hereinafter (Appendix A *infra*). The Opinion of the United States Court of Appeals for the Fifth Circuit affirming the conviction is, as of this date, unreported, but is set forth hereinafter (Appendix B *infra*).

JURISDICTION

The Opinion of the United States Court of Appeals for the Fifth Circuit affirming the conviction was entered on February 28, 1978. The jurisdiction of this Honorable Court is invoked under Title 28, United States Code 1254(1).

QUESTIONS PRESENTED FOR REVIEW

I

Does an indictment which is silent, but for recitation of statutory language from the Sherman Act (15 USC 1) as to any alleged factual restraint on the flow of interstate commerce and/or substantial effect on interstate commerce suffice to charge the corporate defendant with an offense and advise it of the charges against it?

II

Do restraints of primarily a local nature restrain interstate commerce when the goods to which the restraint was applied have either left the flow of commerce by being stored within the state at the corporation offices for later use on an as needed basis within the state, or when there is no showing that the local restraints substantially affected interstate commerce, where the only proof offered by the Government to show a restraint was a stipulation to the effect that the corporation had purchased some of its garments and incidental supplies from out of state sources?

III

Does the "slight evidence" test used to connect a corporation to an existing conspiracy abrogate the Government's burden of proving beyond a reasonable

doubt that each and every alleged member of the conspiracy had the deliberate knowing specific intent to join the conspiracy and did so join it, particularly when the evidence reveals that participation in the alleged conspiracy was unequivocally denied by all of the corporation's division managers and the Government's proof on the alleged participation was not specific and was contradicted by its own witnesses and exhibits.

IV

Do the acts of the agents of the corporation impute liability to the corporation under the Sherman Act (15 USC 1) when those acts were in direct opposition to instructions given them by the president of the corporation, outside the scope of their authority and without any intention on the agent's part to benefit the corporation by his acts?

V

Does the "per se" violation standard of the Sherman Act (15 USC 1) apply to a situation in which the alleged anti-competitive conduct was, in fact, the honoring of contractual customer accounts so as to avoid lawsuits for tortious interference with contract and which conduct is so unique that the courts lack sufficient experience with business relationships and judgments of the type created by the conduct?

VI

Does the Jencks Act (18 USC 3500) and/or a Standing Discovery Order from the lower court to the effect that the Government must reveal to the defendant corporation papers and documents it intends to use as evidence at trial, require that the Government disclose

to the defendant corporation, either prior to trial or for cross-examination purposes, the contents of written notes from prior Government interviews with witnesses where at trial the Government read from the said notes to establish its case in chief which recitation the witness adopted as his statement and which narration the trial court believed to be a "verbatim recitation" of the witnesses prior statement?

VII

Are the hearsay records of alleged co-conspirators admissible in evidence against the corporation where independent evidence, *aliunde* the statements or records of the co-conspirators must be introduced and must present a prima facie case of conspiracy and the corporation's connection therewith and the trial court has neither found nor ruled at the time of the admission of the records into evidence that such evidence *aliunde* exists?

STATUTES AND COURT RULES INVOLVED

Title 15, United States Code I (Sherman Act, Appendix C *Infra*).

Title 18 USC 3500 (Jencks Act, Appendix D *Infra*).

Title 18 USC Federal Rules of Criminal Procedure, Rule 7 (Appendix E, *Infra*).

STATEMENT OF THE CASE

Petitioner, Cadillac Overall Supply Company, (hereinafter referred to as Cadillac) is a corporation engaged in the industrial garment industry. It supplies uniforms, industrial cloths and other products to its customers on a rental basis. When it secures a new

customer, Cadillac must make a capital investment in purchasing or taking out of inventory the industrial garments which will be ordered according to the style, color, sizes, business and employee names requested by the customer. According to the stipulation of the parties, some of the garments ordered are shipped from out of state sources to Cadillac which is located in South Florida. (Appendix F *infra*).

Following the initial delivery of the garments to the customer, Cadillac performs further services such as laundering the garments on a periodic basis and replacing those which become worn out or damaged. Customers are generally charged according to the number of garments rented and by the frequency with which they must be cleaned.

In the early 1950's only two companies, Neway Uniform and Towel Supply of Florida (Neway) and Mechanics Uniform Service (Mechanics), conducted a significant amount of business in the South Florida Market. Both companies competed with each other on an open basis.

However, at some point in the later 1950's, it is alleged that Neway and Mechanics made an agreement whereby each would refrain from encouraging the other's customers from changing over to it. In addition to refraining from soliciting the other's customers, the arrangement allegedly called for active discouragement of the customer from changing suppliers.

It was further alleged that if a dissatisfied customer would still insist on changing suppliers, and ultimately did so, the managers of the suppliers would meet and trade customer accounts until the volume of business exchanged was equivalent.

In the 1960's it was alleged that Uniforms for Industry joined the arrangement. Later in the 1960's American Uniform Service, Sanitary Uniform Rental Service Co., and Cascade Linen Services were said to have joined the arrangment.

In 1960, Cadillac Overall Supply Company, headquartered in Detroit, Michigan, acquired the assets of Atlantic Coverall Supply Company and entered the South Florida Market. In the period charged in the indictment as the conspiratorial period—the early sixties until September, 1977, six men served as Florida Division Manager for Cadillac: Alex Penman, from about 1960 until about 1967; Carmin Yannotta, from about 1967 until September, 1969; Bert Kanarek, from November, 1969 until May, 1972; Arthur Benjamin, from May, 1972 until September, 1972; Verne Ouendag, from September, 1972 until March 1973; and Abraham Sherman, 1973 until September, 1974.

On January 27, 1976, Cadillac was indicted along with four other corporations and four individuals for conspiracy to restrain interstate trade and commerce by allocation of customers who rented industrial garments in certain counties in South Florida, in violation of Section 1 of the Sherman Act, 15 USC 1.

In this case, the indictment charged that Cadillac and its co-conspirators by entering into the customer allocation arrangement had unreasonably restrained interstate commerce. (Appendix G *infra*).

The indictment more specifically alleged that:

> "Uniform rental companies located in South Florida regularly purchase or otherwise obtain for the use of their customers industrial garments from manufacturers whose plants are located outside of the state of Florida. Defendants purchase

> substantial quantities of cleansing supplies and packaging materials from suppliers located outside the state of Florida. Thus, during the period covered by this indictment, there was a continuous and uninterrupted flow of industrial garments, cleansing supplies and packaging materials from plants located in states other than Florida to uniform rental companies, including the defendants, within the state of Florida, and then to their customers."

In March, 1976, motions to dismiss the indictment and other motions which called into question the sufficiency of the indictment were filed by certain defendants. On April 9, 1976, the United States Magistrate, J. V. Eskenazi, denied the motions to dismiss. In June, 1976 subsequent motions to dismiss were filed, again challenging the sufficiency of the indictment. At a June 23, 1976 hearing before the Honorable Joe Eaton, these motions were denied in a ruling from the bench though he indicated it was a close question. All defendants except Cadillac then entered pleas of *nolo contendere* and were sentenced. Cadillac pleaded not guilty. The non jury trial of Cadillac commenced on January 10, 1977.

At trial, the Government adduced no proof that the alleged conduct had any effect whatsoever upon the interstate commerce in industrial garments or that the defendant companies had failed to compete fiercely for new business, but chose rather to rely solely upon the above stated stipulation.

After completion of the Government case, Cadillac moved for judgment of acquittal based on lack of jurisdiction which was denied by the Trial Court. In his ruling, the Trial Judge stated in his terse finding that

"it has jurisdiction in this case, under the flow theory there was a not insubstantial effect upon interstate commerce."

The Government sought to prove that there was an agreement to restrain trade evidenced by an arrangement to not solicit customers between the various uniform rental companies and to balance or trade customers between the various competitors in the event that a customer left his original supplier and began being serviced by a new uniform rental company. These activities, the Government charged, constituted customer allocation and per se violation of the Sherman Act.

The Government characterized the customer allocation conspiracy as evidenced by an "arrangement" between the uniform rental companies involving two levels of conduct which may be called "nonsolicitation" and "balancing".

From the point of view of the uniform rental industry, "nonsolicitation" was simply honoring each others valid service contracts with customers who had been originally acquired through fierce competition. "Balancing" was merely keeping a tally of the flow of business for the purposes of sales direction and to make sure that one competitor was not tortiously interfering or raiding ones accounts to the point where retaliatory raiding or court action was in order to protect or rectify violations of their proprietary rights. It was also a legitimate business alternative to expensive litigation.

The contracts were legitimate in purpose under the laws of the State of Florida and were the primary lawful restraint used to protect the suppliers and insure that a customer would stay with the supplier.

Notwithstanding the existence of contracts, there is evidence that solicitation took place anyway. Thus to say there was a consistent pattern of conduct regarding non-solicitation is erroneous.

The Government adduced no proof that customers could not terminate their contracts according to their terms, or that they were discouraged from seeking a new supplier by that supplier. It is not unreasonable to keep a customer as long as possible to guarantee a return on ones initial investment. The Government acknowledges the investment and the right to protect it. ("Certainly a man has a right to protect his contract, whatever his proprietary interests in his contract is.")

These contracts were enforced through litigation as well as letters and telegrams threatening legal action in the event the contract was breached. However, litigation, being an expensive form of dispute settlement, particularly when dealing with contracts involving small amounts of money, was not practical in every case.

There was testimony that certain of the uniform rental companies contacted each other regarding competitors customers who had contacted them or who had been solicited by their salesmen and who had expressed dissatisfaction with their existing service. Not to be overlooked is the fact that more often than not, the customer would express dissatisfaction directly to his supplier or service man. It was uncontradicted that from whatever source customer dissatisfaction was ascertained, the supplier attempted whatever he could to appease the customer including lowering prices and supplying new garments.

As to the balancing conduct, there was no evidence of a demonstrative effect on prices, volume of garments, quality or of exchanging customer lists or territorial maps. There is no doubt that other garment service was available and the customers were not foreclosed from choosing between competing services.

The frequency of the complained of activity is at best, speculative, though the relatively few occasions set forth in the Government's proof and the Trial Court's conclusions, in comparison to the literally thousands of accounts involved give added support to the occasional circumstances in which "balancing" would take place.

Assuming that the trier of fact found this conduct to be illegal, the inquiry then turned to evidence of Cadillac's participation in "nonsolicitation" and "balancing".

The testimony from all the Cadillac Florida Division Managers who were mentioned in the Government's case was consistent—they solicited all customers. In some instances, they did not even respect contracts of their competitors as was testified to by Mr. Kanarek and Mr. Penman. They never called other managers about taking business or problem accounts.

The Government witnesses and documents in this regard did not carry their burden. Mr. Rosenblatt of Mechanics recited one contact with Cadillac involving a stop under contract which has been solicited by Cadillac and which Mechanics was able to keep by putting in new uniforms.

Upon examination Mr. Rosenblatt disclosed that Cadillac did solicit the account, but that the customer decided to stay with Mechanics when offered new uniforms. Moreover, Mr. Rosenblatt testified that he never had heard of Cadillac calling to Mechanics to advise them of an unhappy customer under contract to Mechanics. While Mr. Rosenblatt testified that Mr. Sherman, while he was at Mechanics, directed him not to solicit Cadillac accounts, there is no evidence from Mr. Rosenblatt that Cadillac agreed to or understood that it was not to solicit Mechanics accounts.

Mr. Davidoff, the next Government witness, made a general comment that he had communicated with Cadillac with Mr. Kanarek and Mr. Yannotta about problems with their dissatisfied customers. This was unequivocally denied by both Cadillac managers and Mr. Davidoff was unable to relate his conversation with these individuals as to specific accounts, whether the accounts were under contract and the circumstances under which he and his company and Cadillac were involved.

While Mr. Davidoff testified on direct examination that Cadillac did not solicit any of his (Sanitary's) customers between 1969 and 1972, he also indicated that all of Sanitary's business was under contract and that if there was a legitimate contract it would be honored or litigation would be commenced. The Exhibits (Nos. 47, 46 and 69) introduced by the Government through Mr. Davidoff, further impeach his credibility as they clearly show accounts solicited and taken by Cadillac.

Mr. Sherman testified that while he was at Mechanics, there was no real relationship with Cadillac and no relationship with Mr. Yannotta. He also acknowledged that most Mechanics stops were under contract.

When Mr. Kanarek took over, Mr. Sherman testified he told his people to leave Cadillac alone though they did take accounts from one another as shown by Exhibit No. 14. He also testified that he had no relationship as he had with Neway as he never sat down with Cadillac to adjust figures or trade accounts, though he kept records of accounts gained and lost from Cadillac.

Both Mr. Yannotta and Mr. Kanarek solicited Mechanics accounts. Mr. Kanarek says he talked with Mr. Sherman, but not about business and Mr. Yannotta says he never talked with Mr. Sherman. Both men testified they entered into no agreements of any kind with competitors as to the taking of business.

Mr. Sherman then went to Cadillac where he took over and improved business and solicited all accounts. He testified that Mr. Shulevitz, President of Cadillac, told him that "hand holding" carried on by Mr. Sherman while at Mechanics was to be off and he was to solicit accounts, but was to respect contracts.

Mr. Bill Brown of Neway testified he had no relationship with Cadillac, that they raided each others accounts. He says he and Mr. Yannotta agreed to respect each others contracts though they continued to solicit and write business which was not under contract.

Mr. Brown says he met Mr. Kanarek once and the agreement to respect contracts continued as under Mr. Yannotta. Mr. Brown does not remember getting any complaints from Cadillac customers and passing them along. This policy continued until Mr. Sherman came to Cadillac and began raiding without respect to contracts.

During the direct examination of William Brown, the Government attorney read from his notes taken at an earlier meeting in the office of Mr. Brown's attorney. Mr. Brown ratified and approved the long Government narration regarding the "arrangement" when he answered "yes", he did recall making the statement. The Court even believed the narration to be a verbatim recitation. Counsel for Cadillac objected stating that the personal notes bore the opinion or summary of the witnesses statements and that the material should be provided to him for cross examination purposes under the Jencks Act 18 USC § 3500. The Trial Court overruled the objection on two occasions.

Mr. Kushner of UFI, the last Government witness, testified that Cadillac was a competitor and that they took each others stops.

As to Cadillac's participation in the balancing conduct, Mr. Davidoff testified that he communicated with Mr. Kanarek and Mr. Yannotta about the owing of business and reached agreement on the amount of business owed. There was no specificity to his testimony as it was specifically rebutted by the former Cadillac managers. Mr. Yannotta indicated he never spoke with Mr. Davidoff or anyone else at Sanitary. Mr. Kanarek said Mr. Davidoff did roller towel work for Cadillac, but had no other dealings with him.

The various documents introduced by the Government through Mr. Davidoff were hardly probative and were allowed into evidence over well founded objections. Exhibit No. 47 purports to be a record of a communication with Mr. Yannotta which says "no balance owed either party". The document was used by Mr. Davidoff to keep track of accounts gained and lost and

for purposes of eventually reaching agreements as to business owed. The Trial Court stated that it was conclusory as to whether an agreement was reached. It gives no indication that business was traded and could mean that there was never a balance owed. The lack of knowledge, specificity or concurrence by Cadillac would require that the document be given little weight, even if admissible.

Exhibit No. 46 shows an account taken by Cadillac from Sanitary. Again, there is no indication that Cadillac traded business. Mr. Davidoff testified that the account taken, like all other Sanitary accounts, was under contract. This Exhibit also indicated he spoke with Mr. Yannotta. Mr. Davidoff's Exhibit No. 69 shows another account under contract taken by Cadillac and a conversation with Mr. Kanarek. Clearly, these exhibits show solicitation by Cadillac. The Exhibits also do not indicate that Cadillac traded business.

Mr. Kanarek stated positively that he entered into no business dealings with other competitors and never made any agreements of any kind with any competitors concerning the taking of business. Mr. Yannotta testified that he never kept records of business gained and lost to competitors and never entered into any agreement with anyone regarding the conduct of Cadillac's business.

Early on, Cadillac made a standing objection to the admission of hearsay evidence in the nature of statements and documents. This objection in different form (hearsay, relevancy, materiality, specificity, lack of foundation) was raised and overruled several times during the course of the trial. The hearsay offered by the Government and objected to by Cadillac, related

primarily to documents admitted into evidence as exhibits, prepared by competitors of Cadillac's which purported to be "score sheets" of business taken and owned or of agreements reached as to accounts. It was never shown that the objected to documents were known, accepted or executed in the presence of any representative of Cadillac. Mr. Sherman testified regarding personal records prepared by him on which he allegedly listed which competitors owed him business and vice versa. It should be noted that the witness was unable to remember, even after having looked at the proposed Exhibit, when he had written it, nor did he remember when certain notations on the records were made. It was never shown that Cadillac was aware of the records kept by competitors, nor was there evidence introduced which showed Cadillac took part in any record-keeping of its own or reached any conspiratorial agreements as to the figures in the records kept by other persons or was present when the records were executed.

Aside from Mr. Davidoff's testimony of alleged meetings held between himself, Mr. Yannotta and Mr. Kanarek (which testimony was as already contended by Cadillac totally contradicted by Mr. Yannotta and Mr. Kanarek and fatally vague and lacking in specificity), the Government offered no substantial evidence presenting a prima facie case of a nonsolicitation conspiracy and of Cadillac's participation in that conspiracy.

It should be noted that even after Mr. Davidoff's testimony which is the only independent evidence of conspiracy to support the introduction of the hearsay documents, the Trial Court stated,

". . . the Court will later have to determine that as to whether it [Exhibit 47] can go to show an actual conspiratorial agreement as to your person [Cadillac].

This is evidence of what he [Mr. Davidoff] wrote. Now whether or not it can be used to show that the other company [Cadillac] was, in fact, in the conspiratorial agreement comes within your reservation . . ."

The question then arose as to the authority of the Cadillac Managers, even if it was found that the alleged "nonsolicitation" and "balancing" conduct was illegal and Cadillac, through its Managers, had participated therein.

Mr. Sherman testified that he had complete charge of the Cadillac Florida operation, subject only to instructions and orders and policies emanating out of Detroit in the person of its Chairman of the Board and President, Mr. Shulevitz. This was confirmed in Mr. Penman's testimony. Mr. Sherman also testified that when he took over the job at Cadillac, he advised Mr. Shulevitz of his operating methods while at Mechanics and was given explicit orders from Mr. Shulevitz that there would be no hand holding as had been practiced between Neway and Mechanics while Mr. Sherman had been employed at Mechanics.

Mr. Shulevitz testified that in response to the raiding practices of the competitors which nearly ruined his business that he told his division managers to "go out and get all the business then can, they should not respect the competition, no contracts, nor they should have no relationship with none of the companies . . ." He never authorized his managers to enter into any arrangement or relationship with anybody else and

gave these instructions to each one of his division managers. Mr. Shulevitz also testified that he never gave authority to anyone related to the Florida Division to enter into any arrangement with any competitor and expressed his feelings towards his competitors and their raiding of his business in strong emotion filled language.

While the Trial Court colorfully concluded that "a couple of fellows out there working for the bossman . . ." had entered into a few arrangements, he also concluded, "I do not believe that Mr. Shulevitz agreed with anybody . . . on anything about taking business."

The Government did not contradict this testimony of Mr. Sherman or Mr. Shulevitz but rather again relied upon the stipulation (Government Exhibit 81) which placed direct responsibility on the Division Managers for Cadillac's sales and operations in South Florida.

During the five day trial in January, 1977, the trial court admitted certain evidence and made certain rulings which are the basis of this Petition. On January 14, 1977, the trial court adjudged Cadillac guilty and Cadillac soon after, on January 21, 1977, filed its timely Notice of Appeal with the United States Court of Appeals for the Fifth Circuit. Oral argument was requested by Cadillac and was allowed by the Fifth Circuit. Moreover, the Fifth Circuit, perceiving the complexity and scope of the issues involved, granted counsel for Cadillac and the Government additional oral argument time to offer their respective positions to the Court. On February 28, 1978, the Fifth Circuit issued its opinion affirming the Judgment of Conviction.

REASONS FOR ALLOWANCE OF THE WRIT

The present Petition involves review of a conviction stemming from alleged violation of Section 1 of the Sherman Act (15 USC 1) by a corporate defendant. As will be shown, *infra*, the present appeal contains eluments of the following considerations governing review on certiorari pursuant to Rule 19 of the rules of this Honorable Court: First, that the decision of the United States Court of Appeals for the Fifth Circuit would appear to be in conflict with similar cases as decided by this Honorable Court on several federal questions; second, that the Fifth Circuit has, in this case, decided several important questions of federal law as to the Sherman Act (15 USC 1) which have not been but should be decided by this Honorable Court; third, that the lower court as sanctioned by the Fifth Circuit has so far departed from the application of accepted judicial standards, or has applied those standards incorrectly so as to call for the exercise of this Honorable Court's power of supervision.

Broadly speaking, the questions presented to this Honorable Court may be divided into three categories: Jurisdictional (Questions I and II); Substantive (Questions III, IV and V); and Evidentiary (Questions VI and VII).

Petitioner is mindful of the requirement of brevity in its application to this Honorable Court and has diligently attempted to discuss the numerous and complex issues in this anti-trust matter in such a fashion.

I

Cadillac had been indicted for violation of Section 1 of the Sherman Act in connection with its activities in carrying on the business of periodically supplying "in-

dustrial garments" to customers. It is Cadillac's contention that this business is not in interstate commerce and does not directly and substantially affect interstate commerce and that the Government has not properly alleged in its indictment that the defendants, including Cadillac, were engaged in interstate commerce insofar as this service business is concerned or that this service business affected any related interstate business in such manner as is required to establish the violation charged.

There is no direct mention that the flow of industrial garments in interstate commerce has been unreasonably restrained or affected which in itself may be defective. *Elizabeth Hospital, Inc.* v. *Richardson,* 269 F2d 167 (8th Cir., 1969), *cert. denied* 361 US 884 (1959). It is respectfully submitted that this type of indictment notice pleading in terms of the statute is insufficient to inform a defendant of the accusation against him. Indeed the Fifth Circuit found that the indictment was "somewhat conclusory in alleging the effect of the defendant's actions on interstate commerce."

It is respectfully submitted that the Fifth Circuit did exactly what it cautioned against in refuting Cadillac's argument on this issue—it went beyond the four corners of the indictment in finding that it sufficiently set forth the elements of the offense.

As this Honorable Court has stated so recently in *Hamling* v. *United States,* 418 US 87 (1974) one of the tests in determining the sufficiency of the indictment is whether it contains the elements of the offense charged. A mere repetition o fthe statutory language is, as noted below, insufficient.

A virtually identical indictment recently came before Judge Inzer Wyatt in the Southern District of New York in *United States* v. *Allied Maintenance Corp.*, 1976-1 Trade Cases ¶ 60,924 (S.D.N.Y. 1976). There, an indictment charged a violation of Section 1 of the Sherman Act by eleven corporate defendants in the business of supplying building maintenance services in New York State. The defendants there provided janitorial, repair, security, landscaping and other such services. These services were intensely local as in this case. The charge against the defendants was, as in the instant case, customer allocation. The defendants moved to dismiss the indictment for lack of jurisdiction and failure to charge an offense in that the interstate commerce requirement of the Sherman Act had not been met. The Court sustained the motion and dismissed the indictment. There, like here, the only interstate commerce alleged in the indictment was the allegation that the defendants purchased substantial quantities of supplies needed to provide their local services from out-of-state.

Going on to deal specifically with the Government's allegations about supplies, the Court said:

> "The government attempts to support the indictment by pointing to the averment (para. 6) that substantial quantities of supplies were bought by defendants, that these were essential to the furnishing of their 'services' . . . and that 'substantial portions' of such supplies were shipped in interstate commerce . . .
>
> Nothing is said about whether or how the restraints alleged reduced the need for cleaning materials. There is no averment that the restraints had an effect on the trade in supplies used by the corporate defendants. It would appear on the face

> of the indictment that the restraints charged could not possibly affect the trade in the cleaning supplies used—no matter how the customers were divided, no matter how collusive the bids, the same quantity of building maintenance services was involved and the same quantity of cleaning materials were needed." 1976-1 Trade Cases pp. 69-029-69,030.

Judge Wyatt in the *Allied* case did not, as found by the Fifth Circuit, substitute his prediction of the outcome on the merits for a review of the allegations contained within the indictment for he clearly stated, "It would appear *on the face of the indictment* that the restraints charged could not possibly affect the trade in the cleaning supplies used . . ." (Emphasis added).

The similarity between the indictments in *United States* v. *Allied Maintenance Corp. et al,* and *United States* v. *American Service Corp., et al,* is so clear and the legal principles enunciated by Judge Wyatt are so totally applicable, that Cadillac respectfully contends this Court must be persuaded to review the conclusions of both the Fifth Circuit and the lower court on this issue so as to establish a proper standard in determining the sufficiency of indictments, and more particularly to determine whether mere recitation of statutory language without supporting factual allegations allows on indictment to rise to the dignity of sufficiently advising an accused of the particular nature of the offense with which he is charged as is required by the Sixth Amendment.

II

Even if this Court does not rule that the indictment was fatally insufficient, Cadillac states that the Government has failed to meet its burden of proof at trial

as to the jurisdictional prerequisite of interstate commerce under either an "in commerce" theory or "affecting commerce" theory.

The Government in its opening statement at trial in the case against Cadillac placed reliance solely upon the stipulated fact (Appendix F, *Infra*) that Cadillac regularly purchased substantial quantities of uniforms from out-of-state and local sources for rental to their South Florida customers.

Under Section 1 of the Sherman Act, two theories may be used to satisfy the requisite and jurisdictional interstate commerce nexus. These theories are the "affecting commerce" and "flow of commerce" theories. *Mandeville Island Farms Inc.* v. *American Crystal Sugar Co.,* 334 US 219, 68 S.Ct. 996, 92 L.Ed. 1328 (1948); *Las Vegas Merchant Plumbers Ass'n* v. *United States,* 210 F2d 732 (9th Cir., 1954). If an alleged restraint occurs within the flow of interstate commerce, that is "in commerce", substantial effect on that commerce is presumed as a matter of law and no showing need be made that any particular amount of commerce has been affected. On the other hand, when dealing with restraints which are allegedly merely to have affected interstate commerce, that effect must be substantial in order to justify federal regulation.

It is further respectfully submitted that the Fifth Circuit Court's manner of application of long recognized jurisdictional tests to the facts of this case was erroneous thus requiring this Honorable Court's supervision, clarification and correction.

A. Flow Theory

Under the "flow" of commerce test, the question is at what point along the path from manufacturer to

consumer the "flow" might have stopped, thereby rendering any subsequent anti-competitive conduct purely intrastate in nature. In the instant case the trial judge and Court of Appeals for the Fifth Circuit found that the goods remained in the flow of commerce until they were leased to the ultimate consumer.

First, Cadillac asserts that its business has two separate and distinct aspects. The purchase and receiving of the industrial garments from out-of-state suppliers, is of an interstate nature. However, Cadillac contends that the subsequent rental and laundering services provided to its customers is of a purely intrastate nature and hence beyond the reach of the Sherman Act.

The Fifth Circuit called such a view of business as "theoretical and unrealistic" yet it is a view espoused by the Court of Appeals for the Ninth Circuit.

Because operations can be separable though engaged in by one entity, such an entity can engage in intrastate and interstate operations. The relevant inquiry then is one which aspect or business does the restraint operate. *Foster & Kleiser* v. *Special Site Sign Company,* 85 F.2d 742, 753 (9th Cir., 1936), cert. denied, 299 U.S. 613 (1937). In that case the court said:

> "Business may be and usually is composed of both intrastate and interstate operations. The fact that these operations are conducted by a single corporation or individual does not make the entire business so conducted either interstate commerce or intrastate commerce."

Some knowledge of the industrial garment service business is necessary in order to pass upon the merit of Cadillac's position. The business has two distinct aspects. One is the acquisition of the facilities needed

before any service to customers can begin. This involves the ownership of or access to laundry facilities, the ownership or use of automotive vehicles, usually a truck or trucks, and the ownership of adequate quantities of work pants, dress pants, dress shirts, work shirts, coveralls, overalls, etc. which are known in the business as industrial garments. It also includes the repair and replacement of such facilities, vehicles and industrial garments as may become necessary from time to time. The second aspect of the business involves delivering clean industrial garments to customers periodically, i.e., weekly, semi-weekly, daily or as otherwise required, picking up, returning the soiled industrial garments to the laundry where they are washed and ironed and once again delivering the clean industrial garments to the customer, repeating this process over and over.

The industrial garment supplier purchases these industrial garments from time to time from out-of-state or local manufacturers, which supplies are delivered to the industrial garment supplier who stores them in his plant for use when they are needed. As and when they are required to render service, the garments are takn from the bins or shelves where they were kept and delivered to the customer for the customer's use, returned, washed and re-delivered and so-forth. The two operations, (1) the acquisition of industrial garments and (2) their use in service to customers, are completely separate and independent operations. The purchase, shipment, delivery and storage of the industrial garments are one operation which is accomplished in a comparatively short period of time. The delivery, washing and re-delivery is a completely separate operation which goes on for as long as service is supplied

to the customer. Such service is supplied for the period of the customer's contract or otherwise until the customer discontinues service for years. Thus the industrial garment service business as a whole involves a purely local intrastate operation encompassing the service rendered to industrial garment customers and an interstate operation involving the acquisition of new garment supplies, and does not include a constant and continuous flow of industrial garments from the out-of-state manufacturer to the supplier's customers as alleged in the indictment or at the time of trial by the Government.

In the instant case, the interstate activities came to an end when the commodities purchased out-of-state, came to rest within the State of Florida on the inventory shelves of Cadillac. The rental, not sale, of the garments to the general public were transactions consummated locally, involving commodities of a local character having been previously diverted from the flow of commerce.

As has been stated above, the Government has not proved that the business of rendering industrial garment service locally to a customer is part of an interstate operation which begins with the manufacturer of the industrial garment supplies and does not end until such garment supplies are worn out after repeated deliveries and washings and re-deliveries and re-washings. It is manifestly evident that the only relation between these two parts of the business is that the industrial garment supplies are purchased in one part and used in the other. The industrial garment supplies are purchased, stocked and stored and there ends the interstate commerce in industrial garment supplies. Subsequently, they are withdrawn from storage

for rental service to customers and there, with their withdrawal from storage, intrastate commerce, a strictly local operation begins. The Government did not prove that the suppliers placed orders for specific customers. In fact, they admitted that the garments were given to customers in general and not to particular classes.

It is respectfully submitted that failure to perceive this critical distinction by the Court of Appeals is to take a theoretical and unrealistic view of Cadillac's business, to ignore the lack of Government proof on this issue and to take a highly mechanistic approach to Cadillac's business which the Ninth Circuit has eschewed.

Similarly, an understanding of the nature of the industrial laundry business as set forth above makes it clear that the garments left the flow of commerce when they arrived at and were stored in the company's inventory at its plant.

To adopt the theory of the Court of Appeals for the Fifth Circuit is to stretch the "flow" theory beyond all recognizable limits. Realizing that every enterprise, however localized, has some effect, however remote, on the flow of commerce among the states, this Honorable Court has recognized that restraints which only affect interstate commerce in some insignificant degree or attenuated sense are not within the federal commerce power. *United States* v. *International Boxing Club,* 348 US 236, 75 S.Ct. 259, 99 L.Ed. 279 (1955).

The Fifth Circuit's attempt to apply the *Walling* v. *Jacksonville Paper Co.* standard suffers not only from Government lack of proof but also from an apparent misreading of the *Walling* opinion.

In *Walling,* this Honorable Court was faced with a clear case of a temporary pause at a warehouse. The facts of that case indicated that,

> "... the customers constitute a fairly stable group and that their orders are recurrent as to the kind and amount of merchandise. Some of the items carried in stock are ordered only in anticipation of the needs of a particular customer as determined by a contract or understanding with respondent. Frequently orders for stock items whose supply is exhausted are received. Respondent orders the merchandise and delivers it to the customer as soon as possible and that prior to this litigation respondent's trucks would pick up at the terminals of the interstate carriers goods destined to specific customers, return to the warehouse for checking and proceed immediately to the customer's place of business without unloading. That practice was changed. The goods were unloaded from the trucks, brought into the warehouse, checked, reloaded, and sent on to the customer during the same day or as early as convenient." 317 US at 566, 567.

Undoubtedly this was nothing more than a "ritual of placing goods in a warehouse" in an attempt to avoid being engaged in commerce. There is no evidence in *this* case as to how long goods ordered from out of state were stored at the plant. Indeed, there was no proof of placement of orders for specific customers and the Government so admitted at trial. c.f. *Hardrives Co.* v. *East Coast Asphalt Corp.,* 329 F2d 868, 870 (5th Cir., 1964). Common sense dictates that a service company will keep garments on hand to fill orders as quickly as possible and to posit that Cadillac fulfilled specific orders from out of state when those orders

were received runs counter to logic and any facts contained in the record.

What constitutes a "temporary pause" or "continuity of movement" per *Walling* must be established by the facts of each case not as in this case, by "inference" as was done by the Fifth Circuit. Here, there are no facts to so establish it.

The mere fact that the parties stipulated that the out of state garments were for use eventually of in state customers (obviously) does not stand the burden of showing a restraint upon the flow of goods in commerce.

Again, as was stated by the *Walling* Court,

> "We do not believe, however, that on this phase of the case such a course of business is revealed by this record. The evidence said to support it is of a wholly general character and lacks that particularity necessary to show that the goods in question were different from goods acquired and held by a local merchant for local disposition." Id. at 570.

Last, the Fifth Circuit opinion suffers from slipshod application of its own cited precedent of *United States* v. *Flom,* 558 F2d 1179 (1977). Recall in this case the Government relied upon *only* the stipulation that garments moved in commerce, were received by Cadillac and eventually over an unspecified period of time were distributed to its customer. The *Flom* court found that "warehousing for any appreciable length of time before shipment" could interrupt the flow of commerce. The Fifth Circuit could not "infer" that there was no appreciable warehousing period as there is not one

single shread of evidence in this record pointing to *any* such time period.

Given the contradictions within the Fifth Circuit's opinions on the flow theory and the erroneous application by the Fifth Circuit in this case of the *Walling* standard of this Honorable Court, it is respectfully submitted that this Petition be granted.

B. Affecting Commerce Theory

As to the affecting commerce theory, the Fifth Circuit found that interstate commerce was substantially affected.

The Government has taken the position that there is an affect on commerce due to the substantial volume of interstate commerce in industrial goods and that the local aspects of the uniform rental service are inseparable from the interstate purchase of the garments.

The Government has said that there was no "free exchange of customers through the normal system." Assuming that protecting ones investment through contract is abnormal and illegal, the Government goes on to posit that these contracts caused a lack of change of supplies to particular customers and consequently reduced the number of new garments coming into the state. If a customer changed companies on a free competitive basis (which by the way, they had the right to do by simply terminating the contract), rather than be bound by contract, each new company would have to install new garments and thus the quantity purchased

from out-of-state would be increased.[1] The Government has no evidence of any failure of the uniform rental suppliers to compete for new business (i.e., customers who were not at the time receiving industrial garment service from a uniform rental supplier) and that in fact the competition for such business was fierce.

An analysis of the Government's rationale, applied by the Trial Court, reveals its shortcomings, assuming arguendo that the practices as alleged by the Government have been proven and, in fact, took place.

Let us first examine the effects on interstate commerce due to the "non-solicitation" conduct as disclosed by the record. Since the recipients of industrial garment service involved in the charges are old customers, they are already receiving service from a uniform rental supplier. If the customer is refused by another supplier, there is no change in the direction or amount of industrial garments moving into Florida from another state for that customer. The industrial garments for that customer's service still continue to move to the same uniform rental supplier and in the same quantity. No interstate commerce in industrial

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[1] Cadillac respectfully points out to the Court the conflicting position in which the Government finds itself with regard to the key contract issue. As to the jurisdiction, it argues that contracts subverted the normal system of exchange of customers and consequently was inimical to the interstate commerce.

On the other hand, the Government has acknowledged as to the substantive offense that ". . . a man has a right to protect his contract, whatever his proprietary interest in his contract is."

The absurdity of this position underscores the weak Government case as it struggles to use the valid industry contracts to its best, albeit inconsistent, advantage.

garments has been affected. The Government claims however, that commerce is affected to the extent that a new supplier would have been required to install new garments, reduced his inventory and in turn order new garments from out-of-state to replenish his stock. There is no evidence to support this theory in the present record. It is merely the unsupported hypothesis of the Government. In fact, the record does reveal that the Government witnesses established without contradiction, that one method commonly used in dealing with a dissatisfied customer by the original suppliers was to put new garments into the account. Therefore, even if the customer would not be picked up by a new supplier, the flow of garments in interstate commerce is not affected whatsoever as the new garments are supplied by the original supplier, not the competitor.

As to the "balancing" conduct, the customer is accepted by another supplier (the competitor) and subsequently an equivalent amount of business is taken by the original uniform rental supplier or transferred to it by the uniform rental supplier who accepted the customer, the same is true. The business taken in return is provided with new garments which in turn balances the business (and garments) lost when the competitor took the original customer. The same quantity of industrial garment supplies still moves in interstate commerce to each of such suppliers.

It is thus clear in a practical sense that the restraint involved herein neither diminishes nor increases the quantity of industrial garments that move in interstate commerce. At the very most, it may divert some of the industrial garments from one uniform rental supplier to another for a short period of time but the same

quantity continues to move into the state and thus there is no substantial or adverse affect on interstate commerce.

The trier of fact cannot find under the circumstances of the industrial garment business that the quantities of industrial garments moving into South Florida from other states were diminished or effected in any substantial way. See *United States* v. *Starlite Drive-In Inc.,* 304 F2d 419 (7th Cir., 1953).

Whether the two parts of a uniform rental supplier's business such as Cadillac are deemed to be interdependent parts of interstate commerce in industrial garments or whether they are deemed to be separate parts with the service constituting a local business and the purchase of industrial garments constituting an interstate business, the restraint of trade which may be proved herein relates only to the local service part of the business and cannot possibly be proved to have a substantial and adverse effect on interstate commerce. In either event, interstate commerce is neither diminished nor increased by the intrastate activity since no less or more industrial garments would move into South Florida whether or not the restraint exists. *Rosemound Sand & Gravel Co.* v. *Lambert Sand & Gravel Co.,* 469 F2d 416 (5th Cir., 1972).

The cases cited from the United States Supreme Court by the Fifth Circuit in its opinion indicate the case by case nature of such an inquiry into the question of what constitutes substantially affecting commerce for jurisdictional purposes.

In *Goldfarb* v. *Virginia State Bar,* 421 US 773 (1976), this Honorable Court placed great reliance upon the lower court finding that "a significant" portion of the funds used to purchase homes within the state originated from outside of the state thus making attorney fees charged in connection with the sale of these homes impact upon interstate commerce. There has been no lower court finding in this case as to the significance of the out-of-state garment purchases, or any impact of the challenged intrastate practices on interstate commerce in terms of being coincidental in time and/or continuity.

Also critical to the Court's opinion in *Goldfarb* was the fact that it had been clearly proven that the fee schedule fixed fees and deprived consumers of advantages derived from free competition. Id. at 785. Again, in the instant case, there has been absolutely no showing that the customer was restricted in changing garment supply companies. Not one customer testified at trial. In fact, the record does clearly reflect that there was fierce competition in the industry for new business.

For similar reasons, the case of *Hospital Building Co.* v. *Trustees of Rex Hospital,* 425 US 739 (1976) is also distinguishable as this Honorable Court had before it a motion to dismiss a complaint which requires that the allegations of the complaint must be taken as true. Given this presumption of truth, the Court correctly concluded,

> "The complaint, fairly read, alleges that if respondents and their co-conspirators were to succeed in blocking petitioner's planned expansion, petitioner's purchases of out-of-State medicines and supplies as well as its revenues from out-of-State insurance companies would be thousands and perhaps hundreds of thousands of dollars less than they would otherwise be. Similarly, the management fees that petitioner pays to its out-of-State parent corporation would be less if the expansion

> were blocked. Moreover, the multimillion dollar financing for the expansion, a large portion of which would be from out of State, would simply not take place if the respondents succeeded in their alleged scheme. This combination of factors is certainly sufficient to establish a 'substantial effect' on interstate commerce under the Act."

There are no such allegations, let alone proofs, in the instant case which would call for the conclusion that commerce had been substantially effected.

It is respectfully submitted that this Court's holding in *Burke* v. *Ford,* 389 US 320 (1967) is subject to the interpretation of putting the cart before the horse as it apparently invoked the per se doctrine before any showing had been made of an affect upon interstate commerce. A finding of jurisdiction must precede application of the per se doctrine. It does not flow from it. *Las Vegas Merchant Plumbers Assn., supra* at 748.

In this connection, we respectfully remind the Court that this is a criminal case, there is a presumption of innocence and the Government must prove each element of the crime charged beyond a reasonable doubt. There being no firm evidence of a diminution of interstate commerce or any other substantial or adverse effect thereon as a result of the conspiracy charged, proof beyond a reasonable doubt is impossible. While speculation as to effect on commerce may be sufficient for the relatively minimal requirements of an indictment, such speculation as to effect on commerce as engaged in by the Government and the Trial Court and the Fifth Circuit does not rise to the dignity of evidence necessary to prove the substantial effect of jurisdictional purposes as has been consistently required by this Court. Therefore, this Petition should be granted.

III

While Cadillac does not concede that the conduct complained of was either unlawful per se or an unreasonable restraint on trade, assuming arguendo that such conduct is violative of § 1 of the Sherman Act, there is not proof beyond a reasonable doubt that Cadillac participated in the illicit conduct.

As stated by the Trial Judge "in making a determination as to whether Cadillac became a conspirator the Court must consider what Cadillac did itself, said itself, what Cadillac itself did."

The statement of the case sets forth the conflicting evidence as to Cadillac's involvement in the conspiracy, which conflict, Cadillac submits, sufficiently rebuts the testimony relied upon by the Fifth Circuit in its opinion.

Moreover it is urged that this evidence falls far short of establishing guilt beyond a reasonable doubt which remains at the basis of the "slight evidence" test adopted by the Court of Appeals for the Fifth Circuit. It is respectfully submitted that the Fifth Circuit failed in this case not only to follow its own teachings on the "slight evidence" rule, but that the standard they impose in the instant case abrogates the long established common law and case law principle that an accused must be found guilty beyond a reasonable doubt.

United States v. *Duckett,* 550 F2d 1027 (CA5, 1977) considered the standard of review in a conspiracy action. It stated,

> "We have previously pointed out that '[o]ur adherence to the 'slight evidence' rule should make us nonetheless insistent that guilt remain 'indi-

vidual and personal' and *that the government show beyond a reasonable doubt* that each and every alleged member of the conspiracy had the deliberate, knowing, specific intent to join the conspiracy.' *United States* v. *Morado,* 454 F2d 167, 175 (5th Cir.), cert. denied 406 US 917, 92 S.Ct. 1767, 32 L.Ed.2d 116 (1972)." (Emphasis added)

Thus the burden of proof upon the Government is more than the "slight evidence" test espoused by it and adopted by the Fifth Circuit in this case.

It is respectfully requested that this Petition be granted to clarify the apparent conflict of standards within the Court of Appeals for the Fifth Circuit, which conflict threatens long established Canons of Criminal Justice by emasculating the "Beyond Reasonable Doubt" test.

IV

It is the contention of Cadillac that, assuming *arguendo,* its agents in the persons of Mr. Kanarek and Mr. Yannotta or other Florida Division Managers entered into an arrangement to restrain competition in violation of Section 1 of the Sherman Act, these actions cannot be imputed to the corporation defendant, Cadillac.

In the Fifth Circuit, the law is clear that the act of an agent without the knowledge and consent of the principal is not the act of the principal for determining criminal responsibility. *Morgan* v. *United States,* 149 F.2d 185 (5th Cir., 1945).

In the widely cited case of *United States* v. *Food and Grocery Bureau of Southern California, Inc.,* 43 F.Supp. 966 (D.C. Ca., 1942), we see a remarkably similar fact sitation to the instant case. There the Government brought a Section 1 Sherman Act indictment. Certain of the defendants charged in the conspiracy to stabilize prices pleaded nolo contendere. In dealing with various motions by the remaining alleged co-conspirators, the court pronounced the well recognized rule of criminal agency that, for the principal to be liable for the criminal acts of his agent, the principal "must be shown to have knowingly and intentionally aided, advised, or encouraged the criminal act committed by the agent . . . Only when the principal aids, abets, commands or assents to the criminal act can he be held responsible for a crime of which intent is an essential ingredient which is not supplied by law or implied from the doing of the act . . . Strictly speaking, there can be no ratification of a criminal act in which a specific intent is necessary." *Food and Grocery Bureau, supra* at 971.

The *Food and Grocery Bureau* case has been repeatedly cited with approval for the above referred to propositions. See *Pearson* v. *United States,* 147 F.2d 950, 952 (9th Cir., 1945); *United States* v. *Kemble,* 198 F.2d 889, 893 (3rd Cir., 1952); *United States* v. *Quintana,* 457 F.2d 874, 877 n.6 (10th Cir., 1972); *Bruce* v. *United States,* 351 F.2d 318 (5th Cir., 1965), cert. den. 384 US 921 (1966), reh. den. 384 US 958 (1966).

In the case at bar, the Trial Court made a particular finding that the President, Mr. Shulevitz had no knowledge or entered into or authorized the entering into of any illegal act by his agents. In fact, some actions were taken against his express instruction. The Government can take no comfort from the stipulated Exhibit 81 as the Trial Court found that Mr. Shulevitz had neither authorized or condoned any improper activity. His

authority as the corporate policy maker was unquestioned, though his tough competitive policy may not have been followed in all cases by his agents, without his knowledge. Yet, criminality was passed through the agents to the corporation as evidenced by the Trial Courts judgment of a Section 1 Sherman Act violation. It is respectfully submitted as to this issue, not only does the Fifth Circuit once again have conflicting cases, but also that the authority relied upon by the Fifth Circuit in this case, namely *US* v. *Hilton Hotels Corp.*, 467 F2d 1000 (9th Cir., 1973) presents a significant federal question which ought be reviewed by this Honorable Court.

The Fifth Circuit relies in this case upon the line of cases culminating in *United States* v. *Hilton Hotels Corporation,* 467 F2d 1000 (CA9, 1972), cert. denied, 409 US 1125 (1973) for the proposition that the acts of a corporate agent which are within the scope of his apparent authority should be imputed to the corporate principal. In the *Hilton Hotels,* the Ninth Circuit stated a general rule:

> "For these reasons we conclude that as a general rule a corporation is liable under the Sherman Act for the acts of its agents in the scope of their employment, even though contrary to general corporate policy and express instructions to the agent." Id. at 1007.

Cadillac respectfully urges this Honorable Court to grant this Petition so as to review the wisdom of this rule and its application to this case.

Clearly, the acts which the Government alleges took place were directly contrary to Cadillac's managers actual instruction and authority. Yet, the application

of the *Hilton* rationale would impose a form of strict liability upon Cadillac, regardless of the fact that Mr. Shulevitz expressly ordered that no such action take place. The facts of this case clearly do not warrant the application of *Hilton's* "general rule".

One of the supporting premises of *Hilton* was that it would be impossible to identify the guilty agent. Id. at 1006. However, that is not the instant case. Because it would be relatively simple to determine when the alleged violations occurred which manager was in the office at that time, it seems that the application of *Hilton* is not warranted.

Moreover, even *Hilton* requires that to bring an agent's act within the scope of his authority, and hence impose liability upon the corporation, the agent must have a purpose to benefit the corporation regardless of the issues of the corporation's knowledge of the agent's acts or intent. There was *no* evidence, testimonial or documentary, that the purpose of the manager's conduct was to benefit Cadillac. The Cadillac President testified that his accounts had been previously heavily raided when he went into business. Clearly nonsolicitation or balancing accounts which would have the effect of maintaining the status quo, would not benefit Cadillac, particularly when Mr. Shulevitz had instructed his managers to get the lost business back *and more.*

Cadillac urges this Court to recognize that by imputing to a corporation the acts of its agents within their apparent authority and against express instruction, is to go too far and requires a review of *Hilton* principle or, in the alternative, to consider whether the general rule of *Hilton* does not apply to this case because of the lack of evidence of the agents intent to

benefit the company. Such a ruling on this important federal question lies only within the powers of this Honorable Court. The Petition should be granted.

V

The courts in dealing with the substantive allegations of Sherman Act complaints have recognized that were Section 1 to read in the most literal sense, any commercial contract would be deemed to violate it. *Chicago Board of Trade* v. *United States,* 246 U.S. 231, 238, 38 S.Ct. 242, 62 L.Ed. 683 (1918). Therefore, the courts have adopted the so-called "rule of reason" to determine whether most business combinations or contracts violate the provisions of the Act. *Standard Oil Co.* v. *United States,* 221 U.S. 1, 31 S.Ct. 502, 55 L.Ed 619 (1911). An analysis of the reasonableness of a particular restraint includes consideration of the facts peculiar to the business in which the restraint is applied, the nature of the restraint, its effect, its history and the reason for its adoption. *Chicago Board of Trade* v. *United Staes, supra.*

However, there are certain agreements or practices which, because of their "pernicious effect of competition and lack of any redeeming virtue are conclusively presumed to be unreasonable, and therefore illegal, without elaborate inquiry as to the precise harm which they have caused or the business excuse for their use." *Northern Pacific Ry. Co.* v. *United States,* 356 U.S. 1, 15, 78 S.Ct. 514, 2 L.Ed.2d 545 (1958). These are referred to as per se violations.

Cadillac contends that the practices cannot be summarily condemned under the per se doctrine for two related reasons. First, Cadillac contends that the conduct in question is unique and that the courts lack

sufficient experience with business relationships of the type created by the conduct in question to permit application of the per se doctrine. Secondly, Cadillac argues that the restrictions imposed are justified as reasonable and ancillary to lawful agreements which were necessary to protect legitimate business interests.

(1) Lack of Experience With Business Relationships Makes Application Of Per Se Rule Inappropriate.

Because of the severe limitation a per se classification places upon a courts analysis of the relative merit of a particular type of behavior, the courts have been hesitant to extend the per se rule to new types of behavior.

> "It is only after considerable experience with certain business relationships that courts classify them as per se violations of the Sherman Act." *United States* v. *Topco Associations, Inc.,* 405 U.S. 596, 607-608, 92 S.Ct. 1126, 31 L.Ed.2d 515 (1972).

It is the Government's contention, as adopted by the Fifth Circuit in its opinion, that customer allocation is, in effect, a division of markets and hence per se illegal. Cadillac does not concede that there was an arrangement to allocate customers and believes the Government did not carry its burden on this question beyond a reasonable doubt. Assuming, *arguendo* that such an allocation has been established, Cadillac contends that such conduct requires a rule of reason approach. This important federal question governing the scope of per se application to customer restraints has never been passed upon by this Honorable Court.

In its opinion, the Fifth Circuit placed great reliance upon *United States* v. *Consolidated Laundries*

Corp., 291 F2d 563 (2nd Cir., 1961) was faced with the question of whether the per se rule was the appropriate standard in a customer allocation case which also involved predatory practices such as price fixing. The Fifth Circuit did acknowledge that no such practices were involved in the instant case. The court in *Consolidated Laundries* stated:

> "8. It is contended that the trial court erred in applying the per se rule to the restraints charged . . . Assuming that customers were allocated in the case at bar, no more need be proved; we agree that the per se rule should be applied. We fail to see any significant difference between an allocation of customers and an allocation of territory. See *United States* v. *American Linen Supply Co.*, D.C.N.D.Ill., 141 F.Supp. 105, 115." 291 F.2d 563, 574-575.

It is respectfully submitted that the *Consolidated Laundries* case was wrongly decided on this point of law which is a matter of first impression before this Honorable Court. In *Consolidated Laundries,* the court relied upon the territorial allocation cases to analogize to another type of restraint, customer allocation.

The case of *United States* v. *Topco Associates, supra,* is a horizontal division of markets case. The language in the opinion as to customer restriction is not only gratuitous dictum, it comprehends customer restrictions and comparative competition on inter brand and intra brand competition, a situation not encountered in the instant case. Moreover, *Topco* is silent as to whether the customer restrictions failed because they were unreasonable or per se unlawful. In a thoughtful dissent in *Topco,* Chief Justice Burger reviewed the precedent which purported to establish a per se rule as a horizontal territorial allocation and concluded that such a

holding was improper and that the majority was in fact establishing a new per se rule.

Territorial allocation is not the equivalent of customer allocation. Any territorial allocation will necessarily result in customer allocation, but the reverse is not true. If territories are allocated, the customer can only be served by one supplier, thus effectively eliminating competition. Here there is no proof that customers were limited to one supplier. Competition for new business was without restriction. Even solicitation took place as to old business. There was no prior agreement on customers division as in the classic allocation case (i.e. Mechanics gets service stations, Neway gets foundries, etc.). There was no proof that alternative garment supply sources were not always available. The conduct in this case is unique from that even set forth in *Consolidated Laundries* and requires a Rule of Reason approach.

In sum there has been no per se rule as to horizontal customer allocation. Thus, to analogize a per se effect to customer allocation compounds the problem for not only does it misapply former precedent, it also fails to analyze the business conduct in question.

Again the Fifth Circuit seeks to paint the conduct at issue with the broad nondiscerning brush of per se illegality by reliance upon tangentially related cases. If any principle comes through from the recent United States Supreme Court case of *Continental T.V., Inc.* v. *G.T. Sylvania,* 97 S.Ct. 2549 (1977), it is the abhorrence of the per se rule.

> ". . . we do not make clear that departure from the rule of reason standard must be based upon demonstrable economic effect rather than as in Schwinn upon formalistic line drawings." Id. at 2562.

It is respectfully submitted that the Fifth Circuit, in contravention of prior precedent from this Honorable Court, has relied upon the "formalistic line drawing" approach through inappropriate analogy to inapplicable cases.

(2) Conduct Was Reasonable and Ancillary to Lawful Agreements Necessary to Protect Legitimate Business Interest.

If a per se approach approach to the conduct herein is improper, Cadillac contends that the challenged conduct was a reasonable restraint on trade and that the ruling of the Fifth Circuit was erroneous. It is to be noted that the record is barren of any rationale or findings by the Trial Court as to whether it weighed the conduct as to its reasonableness.

Consider the Cadillac arguments regarding "non-solicitation" and "balancing" as set forth in the Statement of the Case.

Quoting from the opinion of the Fifth Circuit in this cause:

> "The nonsolicitation of each other's customers was simply a method of assuring non-interference with the service contracts existing between the customer and the other particular company. Cadillac points out that the customers were originally acquired through free and open competition and that it makes a substantial capital investment in purchasing garments to supply each new customer. Cadillac asserts that free and open competition would result in the raiding of accounts which would result in the loss of this capital investment. To litigate against the customer breaching a service contract or against the raiding competitors, Cadillac contends, is too expensive a course of

> action. The 'balancing of accounts' was simply a method of keeping records 'to make sure that one competitor was not tortiously interfering or raiding one's accounts to the point where retaliatory raiding or court action was in order to protect or rectify violations of their proprietory rights.' "

Indeed, the Fifth Circuit allowed that Cadillac's position "at first blush seems to possess some merit."

As the United States Supreme Court stated in *Eastern States Lumber Dealer's Ass'n* v. *United States,* 234 US 600, 609, 34 S.Ct. 951, 58 L.Ed. 1490 (1914):

> "... the [Sherman] act was not intended to reach normal and usual contracts incident to lawful purposes and intended to further legitimate trade ..."

To sustain this judgment of conviction, the Government's position must be that it is in violation of the anti-trust laws to have contracts and protect them against competitors who wish to interfere with the contractual relationship by negotiating rather than litigating in every case. It is respectfully submitted and requested that the Court stop short of such a boundless application of the Sherman Act, which is not only improper, but contrary to the conclusions to be drawn from the evidence in the instant case and to prior precedent from this Honorable Court.

Cadillac respectfully requests that this Court keep in mind that the burden of proof as to the unreasonableness of the conduct involved rests squarely with the Government and it is a burden to be carried beyond the realm of reasonable doubt or to the point of inconsistency with a theory in innocence. *United States* v. *Duckett,* 550 F2d 1027 (CA5, 1977). This Petition

should be grant to consider this important federal issue of first impression.

VI

As set forth more fully in the statement of the case, during the direct presentation of the Government's case, the Government attorney on several occasions read extensively from his notes of prior interviews of the witnesses and asked them to ratify or confirm the fact that they had in fact made the statement.

18 U.S.C. § 3500 requires that statements made by Government witnesses which are in the Government's possession must be turned over to defendant for cross examination purposes after the witnesses direct examination. Under the Act, "statement" means:

> "(1) a written statement made by said witness and signed or otherwise adopted or approved by him . . ."

The Fifth Circuit ruled that the Government prosecutors notes were not statements under the Jencks Act.

"It is settled that a written statement to be produced under §3500(e)(1), need not be signed by the witness . . ., or written by him . . ., or be a substantially verbatim recording of a prior oral statement . . .", *Campbell* v. *United States,* 373 U.S. 487, 492 n.6, 83 S.Ct. 1356, 10 L.Ed.2d 501 (1963); *Goldberg* v. *United States,* 425 U.S. 94, 96 S.Ct. 1338, 47 L.Ed.2d 603 (1976). The adoption of the Government's recitation from its notes through the affirmation of Mr. Brown clearly brought the Government material within the Act.

The failure of the Trial Court to consider, take additional testimony and rule upon the request was error. "Since courts cannot speculate whether [Jencks material] could have been utilized effectively at trial . . . the harmless-error doctrine must be strictly applied in Jencks Act cases." *Goldberg, supra* at 1348 n.21. The Jencks Act statements went to the heart of the Government case regarding the arrangement to allocate the market. Failure to provide them to defense counsel upon his request for the purposes of cross examination was prejudicial error requiring a reversal of this conviction.

Notwithstanding that the notes should have been turned over under the Jencks Act request, it is also submitted that these notes were subject to the Standing Discovery Order of February 6, 1976 which governed document production by the Government. The Order stated in pertinent part:

> "A. The government shall permit the defendant to inspect and copy the following items or copies thereof, or supply copies thereof which are within the possession, custody or control of the government, the existence of which is known or by the exercise of due diligence may become known to the government:
>
> * * * * * *
>
> (5) Books, papers, documents, photographs, tangible objects, buildings or places which the government intends to use as evidence at trial to prove its case in chief, or were obtained from or belong to the defendant.
>
> * * * * * *
>
> It shall be the continuing duty of counsel for both sides to immediately reveal to opposing counsel all newly discovered information or other material within the scope of this Standing Order."

Apparently the interviews occurred in June and July, 1976 and by the continuing terms of the above

order, required the Government to submit this information to Cadillac. There can be no doubt, as shown by the transcript, that the Government used this material at trial "to prove its case in chief . . ." Through these notes, the Government attempted to establish a nonsolicitation agreement between Cadillac and Mechanics and between Cadillac and Neway. It also attempted to establish the role of contracts in the industry and a conspiratorial relationship between Neway and Mechanics. The Government's attempt to spoon feed its witnesses by reading extensively from its notes shows a clear intention to use the material as evidence to prove its case, rather than the mere formulation of questions and requires that this material be made available to Cadillac.

Therefore, it is respectfully urged that this Petition be granted to resolve the conflict between the opinion of the Fifth Circuit in this case and prior decisions by this Honorable Court.

VII

One will note that the Courts have been consistent and firm, and the opinions too numerous to cite, requiring certain safeguards be met before the statements of a co-conspirator may be introduced as substantive evidence against a party. That is, independent evidence, *aliunde* the statements of the co-conspirator must be introduced and must present a prima facie case of conspiracy, and of the defendant's connection with the conspiracy. *Schine Chain Theatres* v. *United States,* 334 U.S. 110, 68 S.Ct. 947, 92 L.Ed. 1245 (1948).

The Fifth Circuit has in fact explicitly set forth a test (denominated as such) as to the requirements that must be met before declarations made by a co-conspirator may be admitted into evidence against the defendant. In *United States v. Olivia,* 497 F2d 130 (5th Cir., 1974), the court stated:

> "We define the test as whether the government by evidence independent of the hearsay declarations of a co-conspirator, has established a prima facie case of the existence of a conspiracy and of the defendant's participation therein, that is whether the other evidence *aliunde* the hearsay would be sufficient to support a finding by the jury that the defendant was himself a conspirator. This test has been expressly adopted by the First, Eighth, and Ninth Circuits."

It is Cadillac's contention that the Government failed to prove by evidence *aliunde* the hearsay statements of the alleged co-conspirators; (i) the existence of a conspiracy and (ii) Cadillac's knowing participation in that conspiracy.

The only inference to be drawn from the Trial Court's remarks as alluded to in the statement of the case, was that to this stage in the trial, there had not been sufficient independent evidence so as to allow into evidence hearsay statements regarding Cadillac's involvement in a conspiracy. In fact, the Trial Court later stated, regarding Exhibit 47:

> "If you want a further discussion for the record for whatever purpose you want to make of it, this may not be admissible on the issue of whether or not Cadillac was a conspirator, because in making a determination as to whether Cadillac became a conspirator the Court must consider what Cadillac did itself, said itself, what Cadillac itself did.
>
> *If however, the Court later determines that Cadillac was a conspirator,* then this gentleman entered this on behalf of Cadillac as an agent of Cadillac, a conspiratorial agent." (Emphasis added)

It is respectfully requested that this Petition be granted in order that the inconsistency between the opinion of the Fifth Circuit in this case and prior precedent from the Fifth Circuit as well as this Honorable Court be resolved on this important federal question.

CONCLUSION

For the foregoing reasons, Petitioner, Cadillac Overall Supply Company, respectfully urges this Honorable Court to grant this Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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Attorneys for Petitioner
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Detroit, Michigan 48226
313 965-3000

Dated: March 25, 1978

APPENDIX

APPENDIX A

(Filed January 14, 1977)

UNITED STATES DISTRICT COURT FOR
SOUTHERN DISTRICT OF FLORIDA

Docket No. FL. 76-6010-CR-JE

UNITED STATES OF AMERICA

vs.

CADILLAC OVERALL SUPPLY COMPANY

Judgment and Probation/Commitment Order

In the presence of the attorney for the government the defendant appeared in person on this date—January 14, 1977.

WITH COUNSEL: Alexander B. Ritchie, Esq., Michael P. Chase, Esq.

PLEA: NOT GUILTY.

FINDING & JUDGMENT: There being a finding of: GUILTY. Defendant has been convicted as charged of the offense(s) of violation of Title 15, United States Code, Section 1, as charged in the One Count Indictment.

SENTENCE OR PROBATION ORDER: The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: the defendant pay a fine unto the United States of America in the sum of FIVE THOUSAND DOLLARS ($5,000.00).

/s/ JOE EATON

Joe Eaton, U.S.D.J.

Date Jan. 14, 1977

APPENDIX B

UNITED STATES v. CADILLAC OVERALL SUPPLY CO.

Appeal from the United States District Court for the Southern District of Florida.

Before THORNBERRY, Circuit Judge, SKELTON, Senior Judge * and HILL, Circuit Judge.

JAMES C. HILL, Circuit Court:

This is a criminal anti-trust case. Appellant Cadillac Overall Supply Company (Cadillac) appeals, following a bench trial, from the verdict and judgment finding it guilty of conspiring to restrain interstate commerce by allocating customers in the rental of industrial garments in several counties in South Florida in violation of Section One of the Sherman Act. 15 U.S.C. §1.

Cadillac presents seven enumerations of error. These are:

(1) That the trial court erred in ruling that the indictment sufficiently alleged a restraint of interstate commerce.

(2) That there was insufficient evidence to establish at trial that the restraint occurred in the flow of or substantially affected interstate commerce.

(3) That the evidence was insufficient to establish that the defendant-appellant was a participant in the customer allocation conspiracy.

(4) That the trial court erred in holding that the conspiracy to allocate customers constituted a *per se* violation of the Sherman Act.

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* Senior Judge of the United States Court of Claims sitting by designation.

(5) That the trial court erred in imputing the acts of the corporate employees to the corporate defendant.

(6) That the trial court erred in admitting into evidence certain records maintained by the defendant's conspirators.

(7) That the trial court erred in denying the defendant's request to use the prosecutor's witness interview summaries for cross-examination and impeachment in violation of the Jencks Act and the standing discovery order of the District Court.

We affirm.

Before proceeding to the issues presented, we briefly state the facts necessary for an understanding of this case.

Cadillac Overall Supply Company is a corporation engaged in the industrial garment industry. It supplies uniforms, industrial cloths and other products to its customers on a rental basis. When it secures a new customer, Cadillac must make a capital investment in purchasing the industrial garments which will be ordered according to the style, color, sizes, business and employee names requested by the customer. According to the stipulation of the parties, over 50 percent of the garments ordered are shipped from out of state sources to Cadillac which is located in South Florida.

Following the initial delivery of the garments to the customer, Cadillac performs further services such as laundering the garments on a periodic basis and replacing those which become worn out or damaged. Customers are generally charged according to the number of garments rented and by the frequency with which they must be cleaned.

In the early 1950's only two companies, Neway Uniform and Towel Supply of Florida (Neway) and Mechanics Uniform Service (Mechanics), conducted a significant

amount of business in the South Florida market. Initially, both companies competed with each other on an open basis.

However, at some point in the later 1950's, Neway and Mechanics made an agreement whereby each would refrain from encouraging the other's customers from changing over to it. In addition to refraining from soliciting the other's customers, the arrangement called for active discouragement of the customer from changing suppliers. For example, if a customer of Neway expressed to a Mechanics agent that it was dissatisfied with the services rendered by Neway and was contemplating a changing to Mechanics as a supplier, the sales manager of Mechanics would call the manager of Neway and inform him of the customer's complaint. Mechanics would cooperate with Neway to satisfy the customers complaint, and try to discourage the customer, by means of increased price or the like, from changing over to Mechanics.

If a dissatisfied customer would still insist on changing suppliers and ultimately did so, the managers of the suppliers would meet and trade customer accounts until the volume of business exchanged was equivalent. For example, if Neway had lost a customer to Mechanics, despite their joint efforts to the contrary, Neway would accept the account of a disgruntled Mechanics customer.

In the 1960's the evidence established that Uniforms for Industry joined the arrangement. Later in the 1960's American Uniform Service, Sanitary Uniform Rental Service Co., and Cascade Linen Services joined the arrangement.

In 1960, Cadillac Overall Supply Company, headquartered in Detroit, Michigan, acquired the assets of Atlantic Coverall Supply Company and entered the South Florida market.

In a finding, which we shall review, the trial judge found that Cadillac also joined the customer allocation conspiracy and engaged in the nonsolicitation and account balancing scheme.

I. *Was a Restraint on Interstate Commerce Alleged?*

In its first enumeration of error, appellant contends that the indictment failed to allege a restraint by the appellant on interstate commerce in violation of the Sherman Act.

In this case, the indictment charged that the defendant and its co-conspirators by entering into the customer allocation arrangement had unreasonably restrained interstate commerce. The indictment stated that the effects of the conspiracy were to curtail competition in the uniform rental industry, restrict the free choice of the consumer, and stabilize prices at an artificial and noncompetitive level. The indictment more specifically alleged that:

> Uniform rental companies located in South Florida regularly purchase or otherwise obtain for the use of their customers industrial garments from manufacturers whose plants are located outside of the state of Florida. Defendants purchase substantial quantities of cleansing and packaging materials from suppliers located outside the state of Florida. Thus, during the period covered by this indictment, there was a continuous and uninterrupted flow of industrial garments, cleansing supplies and packaging materials from plants located in states other than Florida to uniform rental companies, including the defendants, within the state of Florida, and then to their customers.

In reviewing the sufficiency of an indictment, we must view the document in a practical sense, and as a whole, *United States v. Smith*, 523 F.2d 771 (5th Cir. 1975), *cert. denied*, 429 U.S. 817, 97 S.Ct. 59, 50 L.Ed.2d 76 (1976) to

determine whether it sets forth the elements of the offense charged in order that the constitutional right of the judgment not to be placed in double jeopardy will be insured and so that the right of the defendant to be informed of the accusation may be afforded. *Hamling v. United States,* 418 U.S. 87, 94 S.Ct. 2887, 41 L.Ed. 590 (1974); *United States v. Driscoll,* 454 F.2d 792 (5th Cir. 1972). Fed.R.Crim.P. Rule 7.

In this Circuit, we have held that, ordinarily the pleading of the allegations in terms of the statute is sufficient to fulfill this dual requirement. *United States v. Lester,* 541 F.2d 499 (5th Cir. 1976).

Under Section 1 of the Sherman Act, two theories may be used to satisfy the requisite and jurisdictional interstate commerce nexus. These theories are the "affecting commerce" and "flow of commerce" theories. *Mandeville Island Farms Inc. v. American Crystal Sugar Co.,* 334 U.S. 219, 68 S.Ct. 996, 92 L.Ed. 1328 (1948); *Las Vegas Merchant Plumbers Ass'n v. United States,* 210 F.2d 732 (9th Cir. 1954).

In the instant case, our review of the sixth allegation of the indictment, when read in light of the above standards, convinces us that the indictment sufficiently alleged a restraint on interstate commerce under the "flow of commerce" theory.

While the indictment was somewhat conclusory in alleging the effect of the defendant's actions on interstate commerce, we hold that the indictment, when read as a wh[illegible] and in a practical sense, adequately informed the defendant of the charges against it and was sufficient to protect the defendant from double jeopardy. The defendant has failed to show any prejudice flowing from any lack of specificity. *United States v. Gates,* 528 F.2d 1045 (5th Cir. 1976), *cert. denied,* 429 U.S. 839, 97 S.Ct. 110, 50 L.Ed.2d 106 (1976).

It must be remembered that in testing the sufficiency of an indictment, a court must not pierce the pleadings and make a premature resolution of the merits of the allegations. See *United States v. South Florida Asphalt Company,* 329 F.2d 860 (5th Cir. 1964). Rather, as when confronted with a motion to dismiss a civil complaint for failure to state a claim, the court must look to the allegations to be true, determine whether a criminal offense has been stated.

Appellants' reliance on the case of *United States v. Allied Maintenance Corp.,* 1976-1 Trade Cases § 60,924 (S.D.N.Y. 1976), is misplaced. Our reading of the case indicates that the Court substituted its prediction of the outcome on the merits rather than determining whether the allegations, accepted as true, stated a violation of the Sherman Act. We therefore decline to accept appellants' suggestion that we adopt the *Allied Maintenance* case as authority to dismiss the indictment. Appellants enumeration of error is meritless.

II. *Was a Restraint on Interstate Commerce Proven?*

All parties recognize that the mere pleading of a restraint on interstate commerce is insufficient to sustain a conviction under the Sherman Act. Rather, the Government at trial must prove the existence of such a restraint.

The requirement that a restraint on interstate commerce be present acts as a jurisdictional limitation on the power of Congress, pursuant to the interstate commerce clause of the Constitution, to condemn such an arrangement as that alleged here. *Rasmussen v. American Dairy Association,* 472 F.2d 517 (9th Cir. 1973). Yet, it has repeatedly been recognized that in enacting the Sherman Act, Congress intended to exercise the full sweep of its power in making illegal "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint

of trade or commerce among the several States . . . ." *United States v. South-Eastern Underwriters Ass'n,* 322 U.S. 533, 64 S.Ct. 1162, 1174, 88 L.Ed. 1440 (1944); *United States v. Frankfort Distilleries, Inc.,* 324 U.S. 293, 65 S.Ct. 661, 89 L.Ed. 951 (1945); *Las Vegas Merchant Plumbers Ass'n v. United States,* 210 F.2d 732 (9th Cir. 1954).

In its second enumeration, appellant contends that the Government failed at trial to prove the requisite restraint on interstate commerce. The trial judge, after taking all the evidence, found that such a restraint had been proven. In order to resolve this issue, we must review the evidence and determine whether or not the Government proved a restraint on interstate commerce under either the "flow of commerce" or the "affecting commerce" tests.

Prior to trial, the parties stipulated that Cadillac had purchased over half of its garments and incidental supplies from out-of-state sources. These purchases were in excess of $100,000.00 for the years 1970-1972. Cadillac, it was undisputed, was one of the smaller businesses alleged to have participated in the conspiracy.

When this evidence is coupled with the admission of agents of some of the alleged co-conspirators that the customer allocation scheme had lasted over a decade, the restraint is easily seen to encompass a very large volume of goods moving into South Florida from out-of-state sources.

There is thus no question that a substantial volume of industrial garments and supplies were in the flow of interstate commerce until they reached the appellant and the alleged co-conspirator companies. Under the "flow of commerce" test, the question is at what point along the path from manufacturer to consumer the "flow" might have stopped, thereby rendering any subsequent anti-competitive conduct purely intrastate in nature.

The point at which the flow came to rest is a factual question left initially to the finder of fact. *United States v. Flom,* 558 F.2d 1179 (5th Cir. 1977); *Las Vegas Merchant Plumbers Ass'n v. United States, supra.* When the finder of fact is the trial judge, unless it is clearly erroneous, the finding must stand. *United States v. Rischard,* 471 F.2d 105 (8th Cir. 1973); *United States v. Tallman,* 437 F.2d 1103 (7th Cir. 1971). Here, the trial judge found that the goods remained in the flow of commerce until they were leased to the ultimate consumer.

Appellants' challenge this in a two pronged attack.

First. Cadillac asserts that its business has two separate and distinct aspects. The purchase and receiving of the industrial garments from out-of-state suppliers, they admit, is of an interstate nature. However, Cadillac contends that the subsequent rental and laundering services provided to its customers is of a purely intrastate nature and hence beyond the reach of the Sherman Act.

After review of the entire record, we decline to take such a theoretical and unrealistic view of Cadillac's business. The record contains no evidence to rebut the conclusion that Cadillac's entire Florida operation was conducted as a single integrated whole.

The evidence established that Cadillac ordered new garments from out-of-state sources to supply newly retained customers and to replace the rental stock of an existing customer. This evidence strongly supports the view that the business was an integrated operation. We therefore reject this bifurcated approach urged by appellant for the first time on appeal.

In a closely related argument challenging the finding that the flow had not stopped until it reached the customers, appellant contends that the garments had left the stream of commerce when they arrived at and were stored

in the company's warehouse. The interstate nexus, it is contended, had thus dissipated when the garments were thereafter delivered for the customer's use.

It has long been established that,

> "[t]he entry of goods into the warehouse interrupts but does not necessarily terminate their interstate journey. A temporary pause in their transit does not mean that they are no longer 'in commerce' within the meaning of the Act. . . . if the halt in the movement of the goods is a convenient intermediate step in the process of getting them to their final destinations, they remain 'in commerce' until they reach those points. Then there is a practical continuity of movement of the goods until they reach the customers for whom they are intended. That is sufficient. Any other test would allow formalities to conceal the continuous nature of the interstate transit which constitutes commerce." *Walling v. Jacksonville Paper Co.*, 317 U.S. 564, 568, 63 S.Ct. 332, 87 L.Ed. 460 (1942).

Likewise, in this Circuit, we have held that "where the circumstances under which the shipment was made are such as to nearly equate shipment in response to an order, . . . the temporary halt did not break the chain of commerce." *Hardrives Co. v. East Coast Asphalt Corp.*, 329 F.2d 868, 870 (5th Cir. 1964). Taking a practical view of interstate commerce, we must look to the ultimate disposition of the product that is contemplated by the appellant and the industrial garment industry. *Hardrives Co. v. East Coast Asphalt Corp., supra; Northern Cal. Pharmaceutical Assoc. v. United States*, 306 F.2d 379 (9th Cir. 1962).

Recently in *United States v. Flom, supra,* this Court went further and refused to hold that the fabrication of a product, subsequent to its arrival at a warehouse within

a state, resulted in the removal of the product from the flow of interstate commerce.

On appeal, Cadillac stresses the dearth of testimony as to the flow of the garments into Florida and onto the lessees. This is easily explained by the pre-trial stipulation entered into between the Government and Cadillac's trial counsel.

In pertinent part, the stipulation states that:

> Cadillac Overall Supply Company has regularly purchased substantial quantities of industrial garments for its Florida Division from companies located in Tennessee, Missouri, Michigan, Georgia, Illinois, New Jersey, Oklahoma and New York. The garments were shipped to the Florida Division of Cadillac Overall Supply Company for the use of its customers in South Florida.

Under the mandate of *Glasser v. United States,* 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942), we must view the evidence and all reasonable inferences flowing therefrom in the light most favorable to the Government.

In this light, we think the evidence was sufficient to support the finding that the garment remained in the flow of commerce until they reached the consumer-lessees.

As shown above, Cadillac stipulated that garments were ordered from out-of-state sources to supply its customers. The testimony at trial established that when taking on a new customer, Cadillac would have to make an investment in uniforms and the like in order to supply that customer. Likewise, garments would be ordered to replace the worn out stock of existing customers.

The trial judge was of the opinion that the inference to be drawn from the evidence was one of a practical continuity of movement from out-of-state suppliers to the garment lessees: "Now, as to the flow theory, garments

simply were being shipped in here, passed through the ordering company and sent out to the Gulf station and the Gulf station unwrapped them and put them on." We share this view of the evidence and hold that the finding of the trial judge, that the garments were "in commerce" until leased to the customers, is not clearly erroneous.

Although we need go no further in finding that interstate commerce was restrained, we shall address the issue as to whether the proof sustained a finding that interstate commerce was substantially affected.

It is well established that a local restraint on intrastate commerce may nevertheless substantially and adversely affect interstate commerce and thus violate Section 1 of the Sherman Act. *Hospital Building Co. v. Trustees of Rex Hospital,* 425 U.S. 738, S.Ct. 1848, 48 L.Ed.2d 338 (1976); *United States v. Employing Plasterers Ass'n,* 347 U.S. 186, 74 S.Ct. 452, 98 L.Ed. 618 (1954).

In its attack of the "affecting commerce" test, Cadillac asserts that since there was no proof of increased prices due to the restraint and no proof that a greater quantity of merchandise would have entered Florida in the absence of the restraint, the alleged customer allocation conspiracy did not substantially and adversely affect interstate commerce. We disagree.

It is well settled that under Section 1 of the Sherman Act, the scrutiny of the Court must be directed to the character of the restraint, not the amount of commerce restrained. *Goldfarb v. Virginia State Bar,* 421 U.S. 773, 785, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1976); *United States v. Socony Vacuum Oil Co.,* 310 U.S. 150, 221-223, 60 S.Ct. 811, 84 L.Ed. 1129 (1940). Recent Supreme Court authority has squarely held that the Sherman Act reaches unsuccessful restraints on interstate commerce as well as those which have not been shown to affect the price of

goods or services in the market place. *United States v. Topco Associates, Inc.,* 405 U.S. 596, 92 S.Ct. 1126, 31 L.Ed.2d 515 (1972).

At trial, the testimony revealed that Cadillac's out-of-state products were manufactured in Detroit. The testimony also revealed that the garments of Neway Uniform, a co-conspirator, were manufactured in Cleveland, Ohio. As the Second Circuit observed in *United States v. Consolidated Laundries Corporation,* 291 R.2d 563, 574 (2d Cir. 1961) if conspirators engage in the allocation of customers, the "customer's range of choice and ability to seek out the supplier who could give him better terms is curtailed." 291 F.2d at 572.

Similarly, the Supreme Court in *Burke v. Ford,* 377 F.2d 901 (10th Cir.), *reversed,* 389 U.S. 320, 88 S.Ct. 443, 19 L.Ed.2d 554 (1967), has held in the context of horizontal territorial market divisions that, as a matter of practical economics, a substantial adverse effect on interstate commerce results by virtue of the restraint, itself.

In *Burke,* liquor entering the State of Oklahoma was found to have come to rest and not have been in the flow of interstate commerce when it was therefore sold out of the wholesaler's inventories to liquor retailers.

In rejecting the retailers' contention that the territorial market division substantially and adversely affected interstate commerce, the Tenth Circuit stated:

> The retailers in this case have utterly failed to prove that if, as we hold, the flow of liquor stopped at the wholesale warehouse, the alleged conspiracy nevertheless adversely affected the flow of liquor into the state. The only pertinent evidence in the record indicates that the net cases shipped to Oklahoma wholesalers increased from 885,976 in 1963 to 891,176 in 1964. If anything, this proves the alleged conspiracy had no effect on the flow of liquor.

The retailers seem to rest their case on the hypothesis that the mere fact of market division and the resulting reduction in the number of wholesale outlets available to the respective distillers ipso facto proved the requisite adverse effect on the free flow of liquor in interstate commerce. In other words, they seem to argue that from this single fact we must infer that interstate commerce was adversely affected. But this is not so. The single fact of a reduced number of wholesale outlets does not give rise to the necessary implication that interstate commerce was adversely affected. While a division of the market is to be sure a per se violation of the anti-trust law, i.e. see *Addyston Pipe and Steel Co.* v. *United States,* 175 U.S. 211, 20 S.Ct. 96, 44 L.Ed. 136, this postulate presupposes but does not prove the requisite connection with commerce. Even though a trivial impact on interstate commerce may be sufficient to bring the activities complained of within the purview of the Sherman Act, i.e. Cf. *Wickard v. Filburn,* 317 U.S. 111, 127, 63 S.Ct. 82, 87 L.Ed. 122, there was no proof whatsoever that the alleged conspiratorial market division either deterred the amount of sales distillers could make into Oklahoma or in any way reduce the price at which they could sell. As Judge Bohanon aptly put it. 'The record shows that the Oklahoma sales of liquor continued to increase and grow. There is no proof here that what the defendants did was a deterrent to interstate commerce.' 377 F.2d at 907-908.

The Supreme Court reversed per curiam and stated:

> The Court of Appeals held that proof of state-wide wholesalers' market division in the distribution of goods retailed in substantial volume within the State but produced entirely out of the State was not by itself sufficient proof of an effect on interstate commerce. We disagree. *Horizontal territorial divisions almost invariably reduce competition among the participants. Addyston Pipe & Steel Co. v. United States,* 175 U.S. 211, 20 S.Ct. 96, 44 L.Ed. 136; *United States* v. *Sealy, Inc.,* 388 U.S. 350, 87 S.Ct. 1847, 18 L.Ed.2d 1238. *When competition is reduced, prices increase and unit sales decrease. The wholesalers' territorial division here almost surely resulted in fewer sales to retailers—hence fewer purchases from out-of-state distillers—than would have occurred had free competition prevailed among the wholesalers.* In addition the wholesalers' division of brands meant fewer wholesale outlets available to any one out-of-state distiller. Thus the statewide wholesalers' market division inevitably affected interstate commerce. (emphasis supplied) 389 U.S. at 321-322, 88 S.Ct. at 444.

More recently in the case of *Hospital Bldg. Co. v. Rex Hospital Trustees, supra,* the Supreme Court in relying on *Burke* once again emphasized that division of markets artificially represses the customer's free choice and almost surely results in fewer purchases of materials than had free competition prevailed.

We conclude from the teachings of the *Burke* and *Hospital* cases that the Government proved a substantial adverse affect on interstate commerce.

First, assuming that open competition had been present, the free choice of the renters of industrial garments to obtain garments from out-of-state suppliers other than those to which their choice was artificially limited would have prevailed. Secondly, as the Supreme Court has held, the renter's freedom to deal with the company of its choice and on the most advantageous terms it could find would have resulted in more garment rentals by the customers of garments supplied from outside the State of Florida.

Thus, we hold that the requisite restraint on interstate commerce was proven to have existed under both the "flow" and the "affect" tests.

III. *Was Cadillac a Participant in the Conspiracy?*

We turn now to address Cadillac's contention that as a matter of law it was not shown to have participated in the customer allocation conspiracy.

It is not seriously contended that a conspiracy among certain industrial garment companies did not exist. On the contrary, it is clear beyond any doubt that such a conspiracy existed. Agents of companies such as Mechanics, Neway, UFI and Superior freely and unequivocally testified that they had agreed not to solicit each other's accounts and had engaged in periodic account balancing. Records were introduced into evidence which bore notations to that effect.

The only question becomes one of Cadillac's participation. Once the existence of the conspiracy has been proved, as it clearly was, only "slight evidence" must be found to connect the defendant to that conspiracy. *United States v. Evans,* No. 76-3715, —— F.2d —— (5th Cir. 1978) and cases cited therein. In this case, we find that ample evidence existed to support the finding that Cadillac was a participant.

Robert Davidoff, a sales manager of Superior, testified that he had engaged in frequent conversations with Cadillac managers, Carmine Yannotta and Burt Kanarek over dissatisfied Cadillac customers who wished to switch suppliers. The purpose of the conversations were to alert Cadillac so that Cadillac could try to retain the accounts. Through other conversations, Davidoff testified that he and Kanarek and Yannotta reached agreements over the balancing of accounts. Records kept by Davidoff confirmed the existence of these agreements.

Mr. Abraham Sherman, now the manager of Cadillac, was formerly the manager of Mechanics. While he denied that he engaged in account balancing with Mr. Kanarek, he did admit that while manager for Mechanics, he had agreed with Kanarek not to solicit each other's existing customers.

Seymore Rosenblatt, a former driver for Mechanics, testified that he remembered a particular dissatisfied Mechanics customer who had told him that he was going to switch to Cadillac. Rosenblatt paid a visit to the store owner. Rosenblatt testified as follows:

> A. The owner told me that Cadillac was willing to write up the business and he was unhappy with the condition of our garments, they were getting old and shabby and Cadillac was going to give him new uniforms and he was going to change over to Cadillac Uniform. This came from the owner.
>
> Q. What did you tell him?
>
> A. Well, I said that if this is the whole question of the matter, what if we were to replace your garments for you?
>
> So, he said, well, if we would do that he would be willing to stay with us, but he had been telling the driver and nothing had been done about it, but after talking to him we told him that I would get him new garments and he agreed to stay with us, so I went back to the company and I called up Howard Young [a Cadillac manager] and told him at that time that if he would stay away from the shop that I would be able to save the stop.
>
> He said he would see that nobody from Cadillac went back there.

Mr. Brown, the sales manager of Neway, testified that he had agreed with Mr. Yannotta to engage in the non-solicitation arrangement. Mr. Sherman also testified that while at Mechanics, he and Mr. Kanarek negotiated an exchange of customers in Monroe County, Florida.

There is additional evidence in the record that supports the conclusion that Cadillac was indeed a participant in the

conspiracy. Yet, in light of the evidence recited above, we need not look any further. The trial judge, heard the evidence, assessed the credibility of all the witnesses, and found that Cadillac was a participant in the conspiracy. There was much more than the necessary "slight evidence," to support the finding of the trial court. Cadillac's enumeration is meritless.

IV. *Rule of Reason or Per Se Analysis.*

We turn now to examine Cadillac's contention that the District Court erred in holding that the customer allocation arrangement constituted a *per se* violation of the Sherman Act.

Cadillac urges that the District Court should have applied the "rule of reason" analysis in determining whether or not the actions of Cadillac violated Section 1. Cadillac argues that its conduct was justified as a reasonable restraint of trade. The non-solicitation of each other's customers was simply a method of assuring non-interference with the service contracts existing between the customer and the other particular company. Cadillac points out that the customers were originally acquired through free and open competition and that it makes a substantial capital investment in purchasing garments to supply each new customer. Cadillac asserts that free and open competition would result in the raiding of accounts which would result in the loss of this capital investment. To litigate against the customer breaching a service contract or against the raiding competitors, Cadillac contends, is too expensive a course of action. The "balancing of accounts" was simply a method of keeping records "to make sure that one competitor was not tortiously interfering or raiding one's accounts to the point where retaliatory raiding or court action was in order to protect or rectify violations of their proprietory rights."

While Cadillac's argument at first blush seems to possess some merit, upon close analysis we reject it.

In *Northern Pacific R. Co. v. United States,* 356 U.S. 1, 5, 78 S.Ct. 514, 518, 2 L.Ed.2d 545 (1958), Justice Black in a much quoted passage explained the rationale for the use of *per se* analysis:

> [T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. This principal of *per se* unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken.

In this case, it is easily observed that the restraint under scrutiny is a purely horizontal market division.

If the restraint were a *territorial* horizontal market division, there would be no question that the *per se* rule would apply. *See e. g., United States v. Topco Associates, supra; United States v. Sealy, Inc.,* 388 U.S. 350, 87 S.Ct. 1847, 18 L.Ed.2d 1238 (1966) and cases cited therein. The defendant has stressed that the restraint in this case, while of a horizontal nature, is not a territorial one. We agree with defendant yet we also agree with the view of the Second Circuit that this is a distinction without substance.

In the case of *United States v. Consolidated Laundries Corporation, supra,* our sister circuit addressed this issue

and squarely held that the allocation of customers is a *per se* violation of Section One.

> . . . We fail to see any significant difference between an allocation of customers and an allocation of territory. *See United States v. American Linen Supply Co.*, D.C.N.D.Ill., 141 F.Supp. 105, 115. Suppose for illustration, that appellants had allocated the Bronx to Consolidated, Brooklyn to General, and Queens to Modern Silver, reserving the right to compete with each other in Manhattan. Clearly this hypothetical division of markets would be unreasonable *per se,* notwithstanding the open competition in Manhattan. Similarly their agreement to suppress all competition as to one phase of their business, i. e., old customers, should be *per se,* illegal irrespective of their competition for new customers. And when, as here, the allocation is coupled with predatory practices against independent linen suppliers in order to compel them to join the conspiracy or be put out of business, there is even more reason not to permit the conspirators to justify their activities on the ground that business expediency makes them reasonable.

291 F.2d at 574-575.

Of course it should be noted that in the instant case the Government neither sought to nor proved that the allocation scheme was coupled with predatory practices such as price-fixing. In recent years, the Supreme Court has held that such an additional showing is not required when a horizontal market division has been shown to exist. *United States v. Topco Associates, supra.*

In addition to the Consolidated Laundries case, more recent authorities from the Supreme Court and this Court support the view we take.

In *United States v. Topco Associates, supra,* the Supreme Court reaffirmed its position that horizontal market

divisions are *per se* violations, in stating: "We think that it is clear that the restraint in this case is a horizontal one, and, therefore, a *per se* violation of § 1." 405 U.S. at 608, 92 S.Ct. at 1134.

In addition to condemning the restraints on the retailing of goods, the Court in *Topco* addressed restrictions on the wholesaling of food products. A strong argument can be made that the Court expressly condemned customer allocation as a *per se* violation of Section One.

The Court characterized the wholesaling restrictions as follows:

> The Government also makes a subsidiary challenge to Topco's practices regarding licensing members to sell at wholesale. Under the bylaws, members are not permitted to sell any products supplied by the association at wholesale, whether trade-marked or not, without first applying for and receiving special permission from the association to do so. Before permission is granted, other licensees (usually retailers), whose interests may potentially be affected by wholesale operations, are consulted as to their wishes in the matter. If permission is obtained, the member must agree to restrict the sale of Topco products to a specific geographic area and to sell under any conditions imposed by the association. Permission to wholesale has often been sought by members, only to be denied by the association. *The Government contends that this amounts not only to a territorial restriction violative of the Sherman Act, but also to restriction on customers that in itself is violative of the Act.* (emphasis supplied) 405 U.S. at 603-604, 92 S.Ct. at 1131.

The Supreme Court held that,

> [J]ust as the territorial restrictions on retailing Topco-brand products must fall, so must the territorial

restrictions on wholesaling. The considerations are the same, and the Sherman Act requires identical results.

> *We also strike down Topco's other restrictions on the right of its members to wholesale goods. These restrictions amount to regulation of the customers to whom members of Topco may sell Topco-brand goods.* (emphasis supplied) 405 U.S. at 612, 92 S.Ct. at 1135.

In our Circuit we have recently held that the allocation of customers is *per se* illegal. In *United States* v. *Flom, supra* this Court examined a customer allocation conspiracy with its attendant price fixing, effectuated by submission of rigged bids on construction contracts. We observed that this market division hampered the free choice of the consumer of the parties with whom the consumer would transact business, and provided no incentive to achieve maximum efficiency on a industry wide basis. The court held in part that "[a]n agreement to 'fix prices, *allocate customers,* rig bids, and coerce [others] to join the conspiracy' violated the Act, *United States v. Pennsylvania Refuse Removal Association,* 357 F.2d 806 (3rd Cir.), *cert. denied* 384 U.S. 961, 86 S.Ct. 1588, 16 L.Ed.2d 674 (1966)." (emphasis in the original). 558 F.2d at 1183.

Indeed, the arguments preferred by Cadillac in defense of its conduct have been previously rejected. In response to the argument that fierce competition would damage the defendant's business, the Court in Topco stated:

> Without territorial restrictions, Topco members may indeed '[cut] each other's throat.' (cite omitted). But we have never found this possibility sufficient to warrant condoning horizontal restraints of trade.
>
> 405 U.S. at 611, 92 S.Ct. at 1135.

The Court also refused to look to the good intentions of the defendant when applying the *per se* rules.

> In applying these rigid rules, the Court has consistently rejected the notion that naked restraints of trade are to be tolerated because they are allegedly developed to increase competition.
>
> 405 U.S. at 610, 92 S.Ct. at 1134.

Indeed in another case, *Copper Liquor Inc. v. Adolph Coors Co.,* 506 F.2d 934 (5th Cir. 1975), this Court rejected, in the context of vertical territorial restraints, the argument that absent the restraint the capital investment of a defendant would be impaired. Our Court answered this argument by stating:

> Just as obvious is the response that activities regarded most worthy of promotion by a society will offer prospective rates of return sufficient to attract the additional capital necessary, that risk is inherent in all capital investment to one degree or another, and that the most efficient allocation of capital resources may be achieved by eliminating restrictions that serve to isolate artificially a particular industry from competition.
>
> 506 F.2d at 941-943 n.5.

We might also add that while the defendant has stressed that the protection of existing service contracts between customer and supplier is the reason for the nonsolicitation of customers of other companies, the record contains ample evidence to suport a finding that the existence of service contracts did not become widespread until the investigation of the anticompetitive conduct in the South Florida market began.

Additional authorities lend support to the view we take yet we need not address them. We hold that the allocation of customers is a *per se* violation of Section One of the Sherman Act.

V. *Corporate Responsibility.*

In its fifth enumeration, Cadillac argues that it was error to impute the acts of the corporate agents to the corporation. Cadillac argues that the acts of its Florida managers in joining the non-solicitation and account balancing arrangement were in direct opposition to instructions given by the president of the corporation and outside the scope of their authority.

Prior to trial, Government counsel and Cadillac's trial counsel entered into a stipulation which stated that the Florida managers were given "direct responsibility for all of Cadillac Overall Supply Company's sales and operations in South Florida." The record as well amply supports the conclusion that the Florida managers had authority to accept or reject customers, to solicit or not solicit customers, and to exchange or not to exchange accounts.

While the evidence established that Mr. Shulevitz, the president of Cadillac, instructed Mr. Sherman, upon his retention in 1973 as Cadillac's Florida manager, to compete openly in all phases of the garment operation and not to engage in "holding hands" with competitors, we think the holding of the Ninth Circuit in *United States v. Hilton Hotels Corporation,* 467 F.2d 1000, (9th Cir.) *cert. denied* 409 U.S. 1125, 93 S.Ct. 938, 35 L.Ed2d 256 (1973) is sound.

In *Hilton Hotels,* the Court held that "as a general rule a corporation is liable under the Sherman Act for the acts of its agents in the scope of their employment, even though contrary to general corporate policy and expressed instructions to the agents." 467 F.2d at 1007.

We think for the reasons stated by the Court in *Hilton Hotels,* that application of this rule to Cadillac is consistent with the policies underlying the Sherman Act.

While it may be that the anticompetitive conduct in this case did not in fact bring monetary gain to Cadillac, this fact does not militate against our conclusion that the actions of the Florida agents were taken for the purpose of benefiting the corporation.

VI. *Remaining Enumerations of Error.*

Finally, we have considered Cadillac's contention that the records maintained by defendants' co-conspirators were improperly admitted into evidence and find this contention to be lacking in merit. They were properly admissible.

Likewise, we reject Cadillac's contention that the prosecutor's witness interview summaries were "statements adopted or approved of by him as contemplated by 18 U.S.C. § 3500 (commonly known as the Jencks Act.) *Goldberg* v. *United States,* 425 U.S. 94, 96 S.Ct. 1338, 47 L.Ed.2d 603 (1976); *Palermo v. United States,* 360 U.S. 343, 79 S.Ct. 1217, 3 L.Ed2d 1287 (1959); *United States* v. *Crumpler,* 536 F.2d 1063 (5th Cir. 1976); *Matthews v. United States,* 407 F.2d 1371 (5th Cir. 1969).

Therefore, it follows that the judgment of the District Court must be and hereby is

AFFIRMED.

APPENDIX C

Title 15

COMMERCE AND TRADE

Chapter 1—Monopolies and Combinations in Restraint of Trade

§ 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

APPENDIX D

§ 3500. Demands for production of statements and reports of witnesses

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate

court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under subsection (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him;

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or

(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

APPENDIX E

Rule 7. The Indictment and the Information

(a) Use of Indictment or Information. An offense which may be punished by death shall be prosecuted by indictment. An offense which may be punished by imprisonment for a term exceeding one year or at ha.d labor shall be prosecuted by indictment or, if indictment is waived, it may be prosecuted by information. Any other offense may be prosecuted by indictment or by information. An information may be filed without leave of court.

(b) Waiver of Indictment. An offense which may be punished by imprisonment for a term exceeding one year or at hard labor may be prosecuted by information if the defendant, after he has been advised of the nature of the charge and of his rights, waives in open court prosecution by indictment.

(c) Nature and Contents.

(1) In General. The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the attorney for the government. It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. Allegations made in one count may be incorporated by reference in another count. It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that he committed it by one or more specified means. The indictment or information shall state for each count the official or customary citation of the statute, rule regulation or other provision of law which the defendant is alleged therein to have violated.

(2) Criminal Forfeiture. When an offense charged may result in a criminal forfeiture, the indictment or

the information shall allege the extent of the interest or property subject to forfeiture.

(3) Harmless Error. Error in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice.

(d) Surplusage. The court on motion of the defendant may strike surplusage from the indictment or information.

(e) Amendment of Information. The court may permit an information to be amended at any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced.

(f) Bill of Particulars. The court may direct the filing of a bill of particulars. A motion for a bill of particulars may be made before arraignment or within ten days after arraignment or at such later time as the court may permit. A bill of particulars may be amended at any time subject to such conditions as justice requires.

APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Criminal No. FL-76-6010-Cr-JE

UNITED STATES OF AMERICA,

v.

CADILLAC OVERALL SUPPLY COMPANY, *Defendant.*

Stipulation

It is hereby stipulated and agreed by and between the UNITED STATES OF AMERICA, by its attorney, and CADILLAC OVERALL SUPPLY COMPANY, by its attorneys, for the purpose of this action only, as follows:

1. Since 1960, CADILLAC OVERALL SUPPLY COMPANY, EVERGLADES LAUNDRY, INC. (doing business as MECHANICS UNIFORM SERVICE), NEWAY UNIFORM & TOWEL SUPPLY OF FLORIDA, INC. and UNIFORMS FOR INDUSTRY, INC. have been corporations engaged in business as uniform rental companies in South Florida. AMERICAN SERVICE CORPORATION was incorporated in 1968 and, since that time, has been engaged in business as a uniform rental company in South Florida. This portion of the State of Florida is composed of the Counties of Palm Beach, Broward, Dade, and that part of Monroe County commonly referred to as the Florida Keys.

2. A uniform rental company rents, launders and delivers industrial garments for working men and women. Industrial garments are any items of work clothing and related products including, but not limited to, work and dress pants, work and dress shirts, overalls, jackets, coats, uniforms, shop towels, dust control materials, and other similar items.

3. In 1973 the above named uniform rental companies had gross revenues of approximately $13 million resulting

from the rental and maintenance of industrial garments in South Florida.

4. Cadillac Overall Supply Company has regularly purchased substantial quantities of industrial garments for its Florida Division from companies located in Tennessee, Missouri, Michigan, Georgia, Illinois, New Jersey, Oklahoma and New York. The garments were shipped to the Florida Division of Cadillac Overall Supply Company for the use of its customers in South Florida. The total cost of merchandise purchased by Cadillac Overall Supply Company from out-of-state and local sources from 1970 through 1974 was as follows:

1970—$210,592

1971—$236,973

1972—$247,322

1973—$199,310

1974—$422,011

5. Cadillac Overall Supply Company has its headquarters in Detroit, Michigan. Its Florida Division had total annual sales from 1970 through 1974 as follows:

1970—$848,639

1971—$849,528

1972—$896,817

1973—$796,691

1974—$1,002,015

6. Cadillac Overall Supply Company first entered the uniform rental business in South Florida in April 1960, when it purchased the assets of Atlantic Industrial Uniform Company.

7. During the period April 1960 to September 1974, direct responsibility for all of Cadillac Overall Supply Company's sales and operations in South Florida was vested in various Florida Division Managers. The following individuals held the position of Florida Division Manager for Cadillac Overall Supply Company during the stated periods: Alex Penman, from about 1960 until about 1967; Carmin Yannotta, from about 1967 until September 1969; Bert Kanarek, from November 1969 until May 1972; Arthur Benjamin, from May 1972 until September 1972; Verne Ouendag, from September 1972 until March 1973; and Abraham Sherman, from March 1973 until September 1974.

Respectfully submitted,

/s/ Gary Flack
Gary Flack

/s/ John T. Orr
John T. Orr

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Counsel for Defendant
Cadillac Overall Supply
Company

APPENDIX G

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

FT. LAUDERDALE DIVISION

UNITED STATES OF AMERICA

v.

AMERICAN SERVICE CORPORATION; CADILLAC OVERALL SUPPLY COMPANY; EVERGLADES LAUNDRY, INC., doing business as MECHANICS UNIFORM SERVICE; NEWAY UNIFORM & TOWEL SUPPLY OF FLORIDA, INC.; UNIFORMS FOR INDUSTRY, INC.; WILLIAM BROWN; BERNARD HERSHOWITZ; ALBERT LEVY; and ABRAHAM SHERMAN, *Defendants.*

Indictment

The Grand Jury charges:

I

DEFINITIONS

1. As used herein, the term:

(a) "Industrial garments" means any item of work clothing and ancillary products including, but not limited to, work pants, dress pants, dress shirts, work shirts, coveralls, overalls, jackets, coats, uniforms, shop towels, dust control materials, and other similar items;

(b) "Uniform rental company" means a company in the business of renting and maintaining industrial garments; and

(c) "South Florida" means the Counties of Palm Beach, Broward, Dade, and that part of Monroe County commonly referred to as the Florida Keys, in the State of Florida.

II

DEFENDANTS

2. The corporations named below are hereby indicted and made defendants herein. Each of these corporations is organized and exists under the laws of the state, and has its principal place of business in the city, indicated below. Within the period of time covered by this Indictment, each of these defendants was engaged in the uniform rental business in South Florida.

	State of Incorporation	Principal Place of Business
American Service Corporation	Delaware	Miami, Florida
Cadillac Overall Supply Company	Michigan	Detroit, Michigan
Everglades Laundry, Inc., doing business as Mechanics Uniform Service	Florida	Miami, Florida
Neway Uniform & Towel Supply of Florida, Inc.	Florida	Opa Locka, Florida
Uniforms of Industry, Inc.	Florida	Miami, Florida

3. The individuals named below are hereby indicted and made defendants herein. During all or part of the period of time covered by this Indictment, each has been associ-

ated with one or more defendant corporations in the capacity set forth below:

Name	Corporation	Position
William Brown	Neway Uniform & Towel Supply of Florida, Inc.	Sales Manager
Bernard Herskowitz	American Service Corporation	Executive Vice President
Albert Levy	American Service Corporation	General Manager
	Everglades Laundry, Inc. doing business as Mechanics Uniform Service	Service Manager
Abraham Sherman	Everglades Laundry Inc. doing business as Mechanics Uniform Service	General Sales Manager
	Cadillac Overall Supply Company	Florida Division Manager

III

Co-Conspirators

4. Various other corporations and individuals not made defendants in this Indictment participated as co-conspirators in the offense charged and have performed acts and made statements in furtherance thereof.

IV

Trade and Commerce

5. Employees of commercial and industrial businesses, institutions, and municipalities wear and use industrial garments. In a substantial number of cases, these industrial garments are supplied by uniform rental companies. In 1973, the defendant corporations had gross revenues from uniform rental business of approximately $13 million in South Florida.

6. Uniform rental companies located in South Florida regularly purchase or otherwise obtain for the use of their customers industrial garments from manufacturers whose plants are located outside of the State of Florida. Defendants purchase substantial quantities of cleansing supplies and packaging materials from suppliers located outside the State of Florida. Thus, during the period covered by this Indictment, there was a continuous and uninterrupted flow of industrial garments, cleansing supplies and packaging materials from plants located in states other than Florida to uniform rental companies, including the defendants, within the State of Florida, and then to their customers.

V

Offense Charged

7. Beginning at least as early as the 1950's, the exact date being to the grand jurors unknown, and continuing thereafter up to September 1974, the defendants and co-conspirators have engaged in a combination and conspiracy in unreasonable restraint of the above described interstate trade and commerce in violation of Section 1 of the Act of Congress of July 2, 1890, as amended prior to December 21, 1974 (15 U.S.C. § 1), commonly known as the Sherman Act.

8. The aforesaid combination and conspiracy consisted of a continuing agreement, understanding and comment of action among the defendants and co-conspirators, the substantial terms of which were to divide, allocate and apportion customers of the defendant and co-conspirator corporations.

9. For the purpose of forming and effectuating the aforesaid combination and conspiracy, the defendants and co-conspirators have done those things which, as hereinbefore charged, they combined and conspired to do.

10. The aforesaid combination and conspiracy has had the following effects, among others:

(a) Competition in the uniform rental industry in South Florida has been restrained.

(b) The freedom of customers to do business with uniform rental companies of their choice has been restricted in South Florida.

(c) The prices charged by uniform rental companies in South Florida have been stabilized and maintained at non-competitive and artificial levels.

VII

Jurisdiction and Venue

11. The combination and conspiracy charged herein was carried out in part by the defendants and co-conspirators within the Southern District of Florida, Ft. Lauderdale

Division, and within the jurisdiction of this Court, within the five years preceding the return of this Indictment.

Dated:

A True Bill

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Jack C. Williamson

/s/ Gary Flack
Gary Flack

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Supreme Court, U. S.
FILED
MAY 26 1978
MICHAEL RODAK, JR., CLERK

No. 77-1389

In the Supreme Court of the United States

OCTOBER TERM, 1977

CADILLAC OVERALL SUPPLY COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 2a-25a) is reported at 568 F. 2d 1078.

JURISDICTION

The judgment of the court of appeals was entered on February 28, 1978. The petition for a writ of certiorari was filed on March 30, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether an indictment charging that the defendants allocated among themselves customers whom the defendants supplied with industrial rental garments that

the defendants had purchased from out-of-state sources sufficiently alleged a restraint of interstate commerce in violation of Section 1 of the Sherman Act.

2. Whether the evidence supports the district court's finding that petitioner's violation occurred in interstate commerce.

3. Whether the evidence supports the district court's finding that petitioner participated in the conspiracy to allocate customers.

4. Whether the acts of corporate employees authorized to manage the business may be attributed to the corporation.

5. Whether an agreement by competitors to allocate customers among themselves constitutes a *per se* violation of Section 1 of the Sherman Act.

6. Whether the trial court properly denied petitioner's request to examine the prosecutor's witness interview summaries.

7. Whether the trial court correctly admitted into evidence statements of co-conspirators.

STATUTE INVOLVED

Section 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. 1, provides in part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. * * *

STATEMENT

In January 1976, a grand jury in the United States District Court for the Southern District of Florida indicted petitioner, a uniform supply company, four other corporations, and four individuals on a single count of conspiracy to restrain trade in the supply of industrial rental garments, in violation of Section 1 of the Sherman Act, 15 U.S.C. 1 (Pet. 6; Pet. App. 34a-39a). All defendants except petitioner pleaded *nolo contendere* (Pet. 7).

The evidence at trial is summarized in the court of appeals opinion (Pet. App. 3a-5a, 16a-18a). It showed that for more than ten years certain industrial uniform rental companies in Florida agreed to allocate customers and to refrain from full competition with each other (*id.* at 3a-4a, 16a). Under the agreement, those companies refrained from soliciting each other's customers and each company would actively discourage the dissatisfied customers of other members of the conspiracy from changing suppliers (*id.* at 4a, 16a-18a). A conspirator contacted by a prospective customer who was dissatisfied with his existing supplier would call that customer's supplier, inform the supplier of the customer's complaint, and discourage the customer from changing suppliers, often by quoting a price higher than the company was then charging (*id.* at 4a). If the customer insisted on changing suppliers, the manager of the company receiving the account would trade accounts with the prior supplier until the volume of business exchanged was equal (*ibid.*).

The evidence of petitioner's participation in the conspiracy included testimony by employees of other companies concerning numerous conversations and transactions with two of petitioner's managers in Florida, in furtherance of the customer allocation scheme (Pet. App. 16a-18a).

The evidence also included a stipulation between the government and petitioner that petitioner "has regularly purchased substantial quantities of industrial garments for its Florida Division from companies located in [other states]" (Pet. App. 32a).

Following a non-jury trial, petitioner was found guilty and fined $5,000 (Pet. App. 1a). The court of appeals affirmed, rejecting each claim advanced in the petition (Pet. App. 2a-25a).

ARGUMENT

The court of appeals correctly rejected each of petitioner's claims. Moreover, those claims raise primarily factual issues limited to this case, involve no conflicts among the courts of appeals, and do not warrant this Court's review.

1. The court of appeals correctly rejected as "meritless" (Pet. App. 7a) petitioner's claim that the indictment failed adequately to allege a restraint of interstate commerce (Pet. 18-21). A conspiracy in restraint of trade violates the Sherman Act if it either occurs in the flow of interstate commerce or substantially affects such commerce. *E.g., Burke* v. *Ford,* 389 U.S. 320, 321. The indictment charged that the conspirators regularly purchased, or otherwise obtained supplies, materials and industrial garments that were manufactured outside the State of Florida, and that "during the period covered by this Indictment, there was a continuous and uninterrupted flow of industrial garments [and materials]" from the out-of-state sources to the defendants and to their customers (Pet. App. 37a, para. 6).

The court of appeals correctly held that "the indictment sufficiently alleged a restraint on interstate commerce under the 'flow of commerce' theory" (Pet. App. 6a). As the court observed, the language of the indictment informed petitioner of the elements of the offense, safeguarded its rights not to be twice placed in jeopardy for the same offense, and provided sufficient information to allow petitioner to prepare an adequate defense (*ibid.*). Nothing more is required of an indictment. *Hamling* v. *United States,* 418 U.S. 87, 117.[1]

2. Petitioner also contends that the evidence was insufficient to establish that the conspiracy occurred in or substantially affected interstate commerce (Pet. 21-34). Its principal argument is that there was not a continuous flow of garments from petitioner's out-of-state suppliers to its ultimate rental customers in Florida; rather it claims that its business "has two separate and distinct aspects" (Pet. 23)—first, the acquisition of garments and supplies from out-of-state and second, the furnishing of those garments to its local customers (Pet. 21-29). Petitioner claims that only the first aspect involves the flow of interstate commerce, that that flow ceases when the

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[1]As the court of appeals also noted (Pet. App. 6a), petitioner has not shown (or even claimed; see Pet. 18-21) that the language of the indictment impaired its ability to understand or defend against the charges.

Although petitioner relies on *United States* v. *Allied Maintenance Corp.,* 1976-1 CCH Trade Cases p. 69,027 (S.D.N.Y.), the court below correctly declined to follow that case on the ground that there the district court "substituted its prediction of the outcome on the merits rather than determining whether the allegations, accepted as true, stated a violation of the Sherman Act" (Pet. App. 7a).

garments are placed in its Florida warehouse, and is not connected with the subsequent local distribution of those garments.

The court of appeals correctly characterized petitioner's argument as "a theoretical and unrealistic view of Cadillac's business. The record contains no evidence to rebut the conclusion that Cadillac's entire Florida operation was conducted as a single integrated whole" (Pet. App. 9a). Rather, the evidence showed that petitioner purchased garments from out-of-state sources for the purpose of supplying its local customers and in response to customer orders (Pet. App. 9a, 32a). The fact that the goods may have been temporarily warehoused does not terminate the flow of commerce in those goods (see, *e.g.*, *Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564, 568), or convert petitioner's integrated business into "two * * * completely separate and independent operations" (Pet. (Pet. 24).[2]

3. There is also no merit to petitioner's claim (Pet. 35-36) that the evidence was insufficient to support the finding that petitioner participated in the conspiracy. The evidence of petitioner's participation included testimony by employees of other members of the conspiracy concerning their conversations and transactions with three of petitioner's managers in Florida (who were stipulated

[2]The proof that the conspiracy occurred in interstate commerce makes it unnecessary to consider the alternative basis of Sherman Act jurisdiction—that the conspiracy substantially affected interstate commerce. In view of the stipulation that petitioner purchased over one hundred thousand dollars of supplies from out-of-state sources in each of the years 1970 through 1972 (Pet. App. 8a), the court of appeals also correctly rejected petitioner's claim (Pet. 29-34) that the evidence was insufficient to establish a substantial effect on interstate commerce.

to have held the position of petitioner's "Florida Division Manager" (Pet. App. 33a)) in furtherance of the allocation scheme (see Pet. App. 16a-17a). As the court of appeals stated (Pet. App. 18a). "T]here was much more [evidence] than the necessary 'slight evidence,' to support the finding of the trial court." There is no need for further review of that conclusion. *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275.

4. Petitioner urges (Pet. 36-40) that it cannot be held liable under the Sherman Act for the acts of its Florida managers. However, at trial petitioner stipulated that those managers were given " 'direct responsibility for all of [petitioner's] sales and operations in South Florida' " and the evidence at trial demonstrated that those managers had authority to accept, solicit, and exchange customers accounts (Pet. App. 24a). This evidence is sufficient to render the corporation criminally responsible for its employees' criminal acts. *United States* v. *A & P Trucking Co.*, 358 U.S. 121, 125-126; *New York Central & Hudson River R. Co.* v. *United States*, 212 U.S. 481, 493-496; *United States* v. *Hilton Hotels Corporation*, 467 F. 2d 1000, 1005 (C.A. 9), certiorari denied *sub nom. Western International Hotels Co.* v. *United States*, 409 U.S. 1125; *United States* v. *American Radiator & Standard Sanitary Corp.*, 433 F. 2d 174, 204-205 (C.A. 3).

Petitioner relies on (Pet. 36-37) *United States* v. *Food and Grocery Bureau of Southern California, Inc.*, 43 F. Supp. 966 (S.D. Cal.) for the proposition that a principal may be held criminally liable for the acts of his agent only when the principal actively aided or encouraged the acts of the agent, and argues that the corporate principal cannot be held liable in this case because the corporate president did not authorize the acts of the Florida agents. The principle stated in *Food and Grocery Bureau* may

apply when the principal in question is an individual. (See cases cited by petitioner at Pet. 37) But when the principal is a corporation, which can act only through its agents, decisions of this Court and the courts of appeals indicate that a corporation is civilly and criminally liable "for the acts of its agents in the scope of their employment, even though contrary to general corporate policy and express instructions to the agents." *Hilton Hotels Corporation, supra,* 467 F. 2d at 1007, see also *United States* v. *A & P Trucking Co., supra; New York Central & Hudson River R. Co.* v. *United States, supra.* To the extent the decision in *Food and Grocery Bureau* applied a different principle to corporate defendants, it is contrary to the clear weight of authority.[3]

5. Petitioner contends (Pet. 40-46) that a conspiracy to allocate customers is not a *per se* violation of the Sherman Act. Petitioner cites no authority for this proposition, and it is contrary to principles established by this Court and the decisions of the courts of appeals that have ruled on this question. Thus, in *United States* v. *Topco Associates,* 405 U.S. 597, 608-612, this Court reaffirmed the principle that the horizontal division of markets by competitors is *per se* unlawful, and in so holding expressly condemned both allocation of territories and allocation of customers.[4] Other courts have

[3]The "corporations" whose motions to dismiss were granted in *Food and Grocery Bureau* were described by the court as "cooperatives" of numerous small merchants. 43 F. Supp. at 973.

[4]Petitioner errs in contending (Pet. 42) that the Court's remarks concerning customer restrictions were "gratuitous dictum." The Court held, 405 U.S. at 612: "We also strike down Topco's other restrictions * * * [which] amount to regulation of the customers to whom members of Topco may sell Topco-brand goods." Moreover, an allocation of customers by competitors is as much a horizontal division of markets as an allocation of territories.

also held that customer allocation agreements are *per se* unlawful. *United States* v. *Flom,* 558 F. 2d 1179, 1183 (C.A. 5); *United States* v. *Consolidated Laundries Corp.,* 291 F. 2d 563, 574-575 (C.A. 2). The court of appeals correctly followed those decisions.[5]

6. Petitioner contends (Pet. 46-48) that the government violated the Jencks Act, 18 U.S.C. 3500, in failing to furnish petitioner with interview summaries prepared by the prosecutor. But the district court determined that the summaries were not "statements" of the witness within the meaning of the Jencks Act (Tr. 426) and the record supports that determination.

Petitioner does not identify the "several occasions" in which "witnesses" (Pet. 46) allegedly ratified the prosecutor's recitation of their prior statements, and in its court of appeals brief petitioner discussed only one occasion in which a witness was asked to comment about the prosecutor's recollection of a prior interview with that witness (Br. 27). The record shows that on that occasion the witness, Mr. Brown, responded affirmatively to the prosecutor's recollection of statements made at an interview, but added "I don't believe I stated it in that manner" (Tr. 428), and the prosecutor did not refer further to his interview summary on the matter. Under those circumstances, the prosecutor's interview summaries cannot " 'fairly be said to be the witness' own [statement]' ". *Goldberg* v. *United States,* 425 U.S. 94, 107.

[5]Moreover, the court properly noted (Pet. App. 23a) that even if petitioner's proferred justification of the customer allocation agreement—the "protection of * * * contracts"—could be a defense to the restraint, the evidence did not support petitioner's explanation; the record indicated that contracts were not widely used in the industry until the grand jury began its investigation of the restraints (*ibid.*).

7. Finally, petitioner contends (Pet. 48-50) that there was insufficient independent evidence of the conspiracy to permit the admission of co-conspirator declarations. The record establishes otherwise. The evidence apart from the declarations of co-conspirators establishing petitioner's participation in the conspiracy included testimony by co-conspirators about numerous conversations with petitioner's agents and also business records reflecting the allocation scheme; both types of evidence are not excludable hearsay (see Fed. R. Evid. 801(d)(2)(D) and 803(6)) and are independently admissible. See also, *e.g.*, *Laughlin* v. *United States*, 385 F. 2d 287, 292 (C.A.D.C.), certiorari denied, 390 U.S. 1003; *Great Lakes Gas Transmission Co.* v. *Grayco Constructor's, Inc.*, 506 F. 2d 498, 503 (C.A. 6), certiorari denied, 420 U.S. 947. That independent evidence was sufficient to permit the admission of co-conspirator declarations in furtherance of the conspiracy.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1978.

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